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Recent Developments in Minnesota Education Law

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**RECENT DEVELOPMENTS IN MINNESOTA
EDUCATION LAW**

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The steady increase in Minnesota education case law in recent years required an organized digest analyzing these recent developments. Chief Judge Popovich, Mr. Niles and Mr. Miller fulfill that need with this Article by reviewing more than 70 cases written by Minnesota appellate courts since 1982.

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INTRODUCTION

Minnesota courts have inundated practitioners with education case law in recent years. The creation of the Minnesota Court of Appeals in 1983 led to much of the exposure. Previously, the overburdened Minnesota Supreme Court decided many school law appeals by summary affirmance. Practitioners were left without significant case law interpreting relevant statutes or developing the common law.

The eruption began in 1982. Since then, numerous cases from the court of appeals and the supreme court have emerged without an organized digest of resulting trends and changes. This Article serves that purpose by sifting the judicial opinions into appropriate categories and summarizing the state of the law.

This Article analyzes six major topics: tort liability, compulsory education, open meeting laws and school closings, hiring and firing issues, arbitration, and appeal and damages. It presents salient Minnesota case law written during the last four

years. The reader is exposed to recent developments and is alerted to unanswered questions.

I. TORT LIABILITY

Minnesota cases regarding a school district's tort liability deal generally with two areas. The first addresses the school district's standard of care and elaborates upon the circumstances under which a school district will be held liable for certain torts. The second area of cases addresses a school district's liability for the torts of its teachers and under what circumstances a school district will be required to defend and indemnify the torts of its teachers.

A. *Standard of Care*

The most recent definitive statement on a school district's standard of care in the protection of its students is contained in *Verhel v. Independent School District No. 709*.¹ In *Verhel*, the Minnesota Supreme Court held that a school district had the duty to supervise the bannering activity of its cheerleading squad.² The case arose out of an automobile accident in which several cheerleaders were injured.³

The plaintiff in *Verhel* was a cheerleader at Denfeld High School in Duluth, Minnesota.⁴ Denfeld's opening game of the football season was to be held on Saturday night, August 30, 1980.⁵ Classes did not start until the following week.⁶ Although the cheerleaders' schedule and constitution required them to practice three times per week during the summer months, the school district did not hire a teacher to supervise

1. 359 N.W.2d 579 (Minn. 1984). Justice Simonett dissented in part and was joined by Justices Peterson, Kelley, and Coyne. *Id.* at 593 (Simonett, J., dissenting in part).

2. *Id.* at 589.

3. A van driven by 17-year-old Karen Pitoscia and carrying 12 Denfeld High School cheerleaders and another student collided with a jeep driven by John House at the intersection of 59th Avenue West and Grand Avenue in West Duluth, Minnesota. *Id.* at 584. Pitoscia was thrown from the van, as was House from his jeep. *Id.* at 585. Cheerleader Robin Verhel sustained the most serious injuries. She underwent surgery to correct multiple fractures of the pelvic area, a fractured right femur and a partially collapsed lung. *Id.* She sued the school district, Pitoscia and her father, House, and Diane Williams, the faculty supervisor. *Id.* at 583.

4. *Id.*

5. *Id.* at 584.

6. *Id.*

the cheerleaders during these months.⁷

Sometime in August, the cheerleaders decided to banner the football players' homes.⁸ During the middle of the night before the game, a 17-year-old cheerleader drove a group of cheerleaders to various houses.⁹ At about 5:00 a.m., the driver rolled through a stop sign and had an accident with another vehicle, injuring plaintiff Robin Verhel and others.¹⁰

The matter was tried to a jury which apportioned fault 35% to the school district, 0% to the faculty supervisor, 26% to the other vehicle's driver, 39% to the van's driver, and 0% to plaintiff and plaintiff's father.¹¹ The jurors found the damages were \$200,200 to Robin Verhel and \$14,000 to her father.¹² On appeal, the school district argued it did not have a legal duty to supervise the cheerleaders' bannering activities because bannering was not specifically approved or sponsored by the school district and took place off of school premises, during summer vacation, on a weekend in the early morning hours.¹³

Citing *Sheehan v. St. Peter's Catholic School*,¹⁴ the Minnesota Supreme Court held the school district had a duty to supervise

7. *Id.* at 583-84. Faculty supervisor Diane Williams was not required by her school district contract to meet with the cheerleading squad during the summer. *Id.* She did attend a few practices voluntarily, but her primary contact with the cheerleaders during that time was through the two squad captains. *Id.* at 584. Testimony differed regarding Williams' involvement with the bannering activity surrounding the accident. The cheerleaders alleged Williams was present at the organizational meeting and made no comment. Williams testified she heard only an offhand remark about bannering and made no inquiry. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 584-85. Verhel was seated in the middle of the van's first bench seat and was pinned there until removed by emergency personnel an hour after the accident. *Id.* at 585. She suffered pelvic fractures not normally correctable by surgery and is now predisposed to lower back pain. *Id.* at 591. Verhel's right leg injury caused an 8% permanent partial impairment. Her ability to perform physical activity was substantially reduced. *Id.*

11. *Id.* at 585.

12. *Id.* at 583, 585.

13. *Id.* at 586. The school district argued, if it were found liable, a duty would be imposed on it to maintain the safety of "all students while in transit to or from a school activity." *Id.* The supreme court found imposition of that duty was not at issue and "clearly a school district is not so liable." *Id.*

14. 291 Minn. 1, 188 N.W.2d 868 (1971). In *Sheehan*, a student's eye was injured by a pebble thrown by another student. The jury awarded plaintiff \$50,000 finding the injury was reasonably foreseeable as a result of the school's failure to supervise. The supreme court affirmed. *Id.* at 2, 188 N.W.2d at 869.

the cheerleaders' bannering activities.¹⁵ The supreme court reiterated the school district's standard of care, stating that the school district had a duty to:

[u]se ordinary care and to protect its students from injury resulting from the conduct of other students under circumstances where such conduct would reasonably have been foreseen and could have been prevented by the use of ordinary care. There is no requirement of constant supervision of all the movements of pupils at all times.¹⁶

The court stated that although a teacher "is not required to anticipate the hundreds of unexpected student acts which occur daily or to guard against dangers inherent in rash student acts,¹⁷ . . . [r]ecovery is allowed in Minnesota if the jury can find from the evidence 'that supervision would probably have prevented the accident.'"¹⁸

The school district's liability arose from their undertaking to supervise cheerleading in the school district. Specifically, the court stated, "A school district's authority springs from its exercise or assumption of supervision and control over a student organization and its activities by appropriate agents of the school district."¹⁹

The court went on to hold that since the school district assumed control over the cheerleading activities, the district had an obligation to supervise those activities in their entirety no matter when and where they occurred.²⁰

The school district in *Verhel* also claimed the accident was not reasonably foreseeable or proximately caused by their failure to supervise the cheerleaders.²¹ In resolving the proxi-

15. *Verhel*, 359 N.W.2d at 586.

16. *Id.* (quoting *Sheehan*, 291 Minn. at 3, 188 N.W.2d at 870).

17. *Id.*; see, e.g., *Morris v. Oritz*, 103 Ariz. 119, 437 P.2d 652 (1968).

18. *Verhel*, 359 N.W.2d at 586 (quoting *Sheehan*, 291 Minn. at 5, 188 N.W.2d at 871).

19. *Id.*

20. The court stated, "Where a school district has assumed control and supervision of all activities of a school club operated under its auspices, parents of participants have a right to rely upon that assumption. *Id.* at 587. The supreme court found the school district had assumed control of the cheerleading squad as a school-approved organization whereby a paid supervisor was responsible for supervising transportation arrangements. *Id.* The court found the school district's responsibility continued during the summer months given approval of the cheerleader's constitution which required summer practice and meetings and cheering at the opening football game which was scheduled prior to the school year. *Id.* at 588.

21. *Id.* at 589.

mate cause issue, the Minnesota Supreme Court again relied upon *Sheehan*, stating:

Sheehan requires that the school district exercise ordinary care to prevent foreseeable misconduct of other students. Thus, although the school district might not be liable for sudden, unanticipated misconduct of fellow students, it is liable for sudden, foreseeable misconduct which probably could have been prevented by the exercise of ordinary care. . . . [P]roximate causation is established by showing the likelihood that the misconduct would have been prevented had the duty been discharged.²²

The supreme court stated the van driver's behavior was foreseeable and could have been prevented if the school district's duty had been discharged.²³

The court's holding and standards set forth in *Verhel* are consistent with past cases.²⁴ A school district must use ordinary care to prevent injury resulting from the conduct of its students. Although there is no requirement of constant supervision of all students at all times, recovery will be available if the evidence indicates that supervision probably would have prevented the accident.

A duty of reasonable care also applies when a school district places dangerous instrumentalities into a student's hands. In *Fallin v. Maplewood-North St. Paul District No. 622*,²⁵ a student was injured using a table saw. In discussing the school district's duty, the court of appeals stated, "School districts have a duty to protect their students. A school district must be *especially cautious* when placing highly dangerous equipment, such as table saws, at the use of the students."²⁶ Upon review, the

22. *Id.* at 589-90 (quoting *Raleigh v. Independent School Dist. No. 625*, 275 N.W.2d 572, 576 (Minn. 1978)).

23. *Id.* at 590. The court stated a supervisor would have intervened if the van's driver was too tired or too pressured to drive safely. *Id.* The court also held the van driver's failure to stop at the intersection's stop sign was not a superseding cause. "Such behavior, or misbehavior, by unsupervised students is to be expected and is precisely the harm to be guarded against by the exercise of the school district's supervision." *Id.* Such conduct was foreseeable and therefore not superseding. *Id.*

24. *See, e.g., Raleigh*, 275 N.W.2d 572; *Sheehan*, 291 Minn. 1, 188 N.W.2d 868.

25. 362 N.W.2d 318 (Minn. 1985), *rev'd* 348 N.W.2d 811 (Minn. Ct. App. 1984). In *Fallin*, a student's thumb became caught in a table saw blade when the wood he was sawing "kicked back." *Id.* at 320. The student was not using an available "anti-kickback" device and, at the time of the accident, his teacher was not in the room. *Id.* His thumb was partially amputated. *Id.* A jury found the school district not negligent and the supreme court ultimately affirmed. *See id.* at 319-20.

26. *Fallin*, 348 N.W.2d at 813-14 (emphasis added).

Minnesota Supreme Court emphasized that school districts are held to a standard of reasonable care.²⁷ A higher standard does not exist regarding dangerous equipment.²⁸

In *Hamilton v. Independent School District No. 114*,²⁹ the court of appeals found that a school district's duty to supervise students also protects members of the public who are not students. In *Hamilton*, the plaintiff was injured when a student pushed another student who, in turn, fell against the plaintiff.³⁰ The plaintiff sustained serious injuries to her hip.³¹ The court of appeals reversed the trial court's granting of summary judgment, stating:

A school district is required to exercise ordinary care to prevent foreseeable misconduct of students. In order to recover damages, a plaintiff need only prove that a general danger was foreseeable and supervision would have prevented the accident. Proximate causation is established by showing the likelihood that the misconduct would have been prevented had the duty been discharged.³²

The court of appeals held causation to be a question for the jury and that reasonable supervision could have prevented the sudden injury by interrupting the misconduct or deterring it altogether.³³ Thus, a school district's duty extends to the gen-

27. *Fallin*, 362 N.W.2d at 321-22. To the extent the court of appeals' statement that a school district need be "especially cautious" was an attempt to charter a new and higher standard of care, the supreme court overruled the intermediate court. *Id.*

28. *Id.* at 321. The supreme court found no case law to support a higher standard of care, but cited several cases supporting a duty of reasonable care. See, e.g., *Matteucci v. High School Dist. No. 208*, 4 Ill. App. 3d 710, 713, 281 N.E.2d 383, 386 (1972) (instructor must exercise due care in instructing and supervising students using dangerous wood shop machines); *Tiemann v. Independent School Dist. No. 740*, 331 N.W.2d 250, 251 (Minn. 1983) (standard of reasonable care required to determine whether teacher and school district negligent in using vaulting horses with exposed holes); *Raleigh*, 275 N.W.2d at 576 (duty of ordinary care required to protect students from foreseeable misconduct of other students during school-sponsored showing of documentary film where student's wrist slashed and purse stolen); *Kingsley v. Independent School Dist. No. 2*, 312 Minn. 572, 574-75, 251 N.W.2d 634, 635 (1977) (school owes duty of reasonable care to inspect and maintain its premises and equipment to protect students from risk of harm where student injured from school locker); *Kiser v. Snyder*, 21 N.C. App. 708, 713, 205 S.E.2d 619, 621 (1974) (teacher subject to ordinary prudent person standard in warning students of risks involved when using metal shearing machine).

29. 355 N.W.2d 182 (Minn. Ct. App. 1984).

30. *Id.* at 183. The incident occurred when spectators were leaving a school basketball game. *Id.*

31. *Id.*

32. *Id.* at 185 (citations omitted).

33. *Id.* The pushing incident was a result of a feud between the involved 13-year-

eral public and not only to the students under its supervision.

In *Tiemann v. Independent School District No. 740*,³⁴ the Minnesota Supreme Court reversed a trial court's granting of summary judgment in favor of the school district and held that the question of the school district's negligence was one that should be determined by a jury.³⁵ In *Tiemann*, a student was injured while performing a gymnastics exercise on a vaulting horse. The handles had been removed from the vaulting horse leaving four large exposed holes.³⁶ The student's finger became stuck in one of the holes while performing a vault, and she was severely injured.³⁷ The trial court granted summary judgment in favor of the school district because the practice of removing the handles from a vaulting horse was common in the schools.³⁸ The supreme court reversed that portion of the trial court's finding and held, "A negligent act will not be excused by the fact that it is customary."³⁹

The Minnesota Court of Appeals faced an unusual situation in *Christopherson v. Independent School District No. 284*.⁴⁰ In *Christopherson*, a student was injured while walking between two school buses. The driver of a school bus accidentally let his foot slip off the clutch causing the bus to lurch forward and pin the student between the buses.⁴¹ The student was taken to the hospital and was treated for leg injuries.⁴² The student required three reconstructive surgeries on her leg for the punc-

old students. About two weeks earlier, the students were involved in a shoving match at a basketball game after which the bullying student was reported to the supervising teacher. *Id.* at 184. The court of appeals remanded the matter, finding a fact issue on causation existed providing the jury with the question whether the supervisor could have acted to prevent the push which injured the plaintiff. *Id.* at 185.

34. 331 N.W.2d 250 (Minn. 1983) (per curiam).

35. *Id.* at 251. Summary judgment in favor of the supervising teacher was also reversed. The supreme court affirmed summary judgment in favor of the manufacturer of the vaulting horse involved in the accident because of insufficient evidence of negligence. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* (quoting *Scattergood v. Keil*, 233 Minn. 340, 343, 45 N.W.2d 650, 653 (1951)). The supreme court did not decide whether permitted use of the vaulting horse with holes exposed was necessarily negligent, nor whether the supervising teacher had failed to place sufficient matting around the horse. Those questions were remanded to the jury. *Id.*

40. 354 N.W.2d 845 (Minn. Ct. App. 1984).

41. *Id.* at 846.

42. *Id.*

ture wound caused when she was trapped between the two school buses.⁴³

At the time of the accident, the student was instructed not to use or exercise her leg.⁴⁴ Without consulting her doctor, however, the student started teaching gymnastics classes.⁴⁵ While demonstrating an exercise on the uneven parallel bars, she tore tendons in her left leg and suffered a 15% to 20% permanent loss of function in that leg.⁴⁶

At trial, the jury apportioned fault 50% to the student, 40% to the bus company, and 10% to the school district.⁴⁷ Thus, the trial court entered judgment denying any recovery for the student and her father.⁴⁸ The trial court did not allow counsel to comment upon the effect of the jury's answers to a special verdict form, and the student and her father appealed claiming prejudicial error.⁴⁹

The court of appeals first addressed whether the trial court erred by forbidding counsel to comment upon the effect of the jury's answers to the percentage of negligence question. The court of appeals held that the trial court erred by forbidding counsel to comment, citing the Minnesota Rules of Civil Procedure.⁵⁰ Thus, it was unnecessary to reach the more substan-

43. *Id.* Sharon Christopherson was 15 years old at the time of the accident. The school principal had been aware students were walking between the buses, but took no action to stop them. The bus company required parked buses to be placed in neutral and the emergency brake set. Prior to the accident, the bus driver was violating both rules. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* Christopherson was first injured on June 7, 1978. *Id.* Her gymnastics accident occurred on July 14, 1983. *Id.* The treating physician had indicated the original injuries would have healed themselves if proper care was taken. *Id.*

47. *Id.* at 847.

48. *Id.* Under Minnesota's comparative fault law a plaintiff's recovery is barred whenever his fault exceeds that of the defendants against whom recovery is sought. See MINN. STAT. § 604.01 (1984).

49. *Christopherson*, 354 N.W.2d at 847. The trial court refused a special verdict form which would have allocated any fault attributable to the student to either June 7, 1978 or July 14, 1983. *Id.*

50. *Id.* at 847-48. The court of appeals cited Rule 49.01(2) of the Minnesota Rules of Civil Procedure, which provides:

In actions involving Minn. Stat. 1971, Sec. 604.01, the court shall inform the jury of the effect of its answers to the percentage of negligence question and shall permit counsel to comment thereon, unless the court is of the opinion that doubtful or unresolved questions of law, or complex issues of law or fact are involved, which may render such instruction or comment erroneous, misleading or confusing to the jury.

MINN. R. CIV. P. 49.01(2). The trial court did not disclose any belief in doubtful,

tive, and more difficult, issue of whether the student's portion of comparative fault should have been allocated to her separate injuries: one on the day the student was trapped between the buses and the other when she was dismounting from the uneven parallel bars. In dictum, the court of appeals stated that the student should recover something for her injuries sustained when trapped between the two buses.

[W]hile an injured party's fault in not avoiding injury may prevent recovery for that injury, it should not act to prevent recovery for an earlier injury. While the law provides the claimant with a remedy whether he seeks to avoid injurious consequences or not, the amount of damages recoverable is limited to the extent that he acted reasonably to prevent his own loss.⁵¹

The apportionment of fault between the two separate accidents, however, appears to be inconsistent with the definition of fault under Minnesota Statutes section 604.01.⁵² *Christopherson* indicates that a plaintiff should be able to recover for one injury regardless of the plaintiff's subsequent exacerbation of that injury.

While it remains uncertain whether a school district's liability is limited or eliminated by a plaintiff's aggravation of an original injury, the general standard of care is clear. A duty of reasonable care is owed to both students and nonstudents. School districts cannot rely on customary care. Reasonable preventive measures are required.

B. School Board's Duty to Indemnify and Defend Teachers Accused of Misconduct

In 1984, the Minnesota Supreme Court decided *Horace Mann*

unresolved, or complex issues of law or fact. See *Christopherson*, 354 N.W.2d at 847. The court of appeals concluded failure to permit counsel comment resulted in substantial prejudice to the student. *Id.* at 848.

51. *Christopherson*, 354 N.W.2d at 848.

52. Fault is defined in section 604.01, subdivision 1a of Minnesota Statutes as follows:

"Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

MINN. STAT. § 604.01, subd. 1a (1984).

Insurance Co. v. Independent School District No. 656.⁵³ This case addressed various insurers' liabilities and the duty to defend a school teacher accused of sexually molesting a student. This case also addressed the school district's duty to defend and the consequent liability under these circumstances. *Horace Mann* represents a comprehensive analysis of these issues but also has some troubling implications.

In *Horace Mann*, the insurer of the teachers' union brought a declaratory judgment action against the school district, its insurer, the teacher, the teacher's homeowner's insurer, the abused student and the student's father for a determination of its duty to defend or indemnify the teacher in the main action. The trial court granted summary judgment in favor of the union's insurer and the homeowner's insurer.⁵⁴ The trial court denied the school district's and the school district's insurer's motions for partial summary judgment.⁵⁵ The Minnesota Supreme Court affirmed the trial court's ruling regarding the union's and the homeowner's insurers.⁵⁶ The court reversed the trial court's refusal to grant partial summary judgment in favor of the school district's insurer.⁵⁷ The court also held the school district had a duty to defend the teacher but not to indemnify the teacher in the main action.⁵⁸

The teacher in *Horace Mann* was employed by the school district as an assistant coach of the girls' basketball team and as a chemical dependency counselor.⁵⁹ During the school years 1978-79 and 1979-80, the teacher inflicted several sexual contacts upon a student on the girls' basketball team who was also receiving chemical dependency counseling from the teacher.⁶⁰ The student suffered emotional problems, and the student and her father sued the teacher.⁶¹ The suit included claims against

53. 355 N.W.2d 413 (Minn. 1984).

54. *Id.* at 413.

55. *Id.* at 414. The school district and its insurer had moved for partial summary judgment on the basis they had no duty to defend the teacher in the main action. *Id.* Subsequent motions to amend findings brought by the same parties were denied. *Id.* A second summary judgment motion by the school district's insurer based on no duty to defend or indemnify was denied. *Id.* at 414-15.

56. *Id.* at 421.

57. *Id.*

58. *Id.* at 415.

59. *Id.*

60. *Id.*

61. *Id.* During the relevant time, the student was in the tenth and eleventh grades. *Id.* Her drug use was substantial including "speed," hashish, and alcohol.

the school district as employer and for its own negligence in hiring and retaining the teacher.⁶² The teacher requested defense and indemnity from the various insurance companies and the school district.⁶³ Horace Mann then commenced the declaratory judgment action.⁶⁴

The Minnesota Supreme Court considered the duties of the insurers individually. It first considered whether Horace Mann, the teachers' union insurer, was obligated to defend and indemnify the teacher. The Minnesota Supreme Court affirmed the trial court's holding that the teacher's conduct was excluded under the intentional damages exclusion of the policy as a matter of law.⁶⁵ Although the teacher claimed he did not intend to harm the student, the court held an intent to injure or to damage the student could be inferred from the nature of the acts as a matter of law.⁶⁶

The supreme court next analyzed the responsibilities of the teacher's homeowner's insurance company. Again, the analysis centered around the intentional injury exclusion contained in the homeowner's policy. In this policy, however, the teacher had purchased a business pursuits endorsement which protected the teacher from claims arising due to the teacher's infliction of corporal punishment.⁶⁷ The supreme court held the teacher was not covered by the homeowner's insurance policy because the intentional injury exclusion still applied.⁶⁸ It found the business pursuits endorsement applied only to "corporal punishment inflicted while engaged in the business pursuit of teaching."⁶⁹

Id. While her chemical dependency caused emotional problems, those problems increased after her contact with the teacher. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 415-16.

66. *See id.* at 416 (citing *Fireman's Fund Ins. Co. v. Hill*, 314 N.W.2d 834, 835 (Minn. 1982)). Intent to injure was inferred from the teacher's unconsented sexual contact with a minor. *Id.*

67. *Id.* at 417.

68. *Id.* at 417-18. "Because there is no coverage under the main policy for intentional injuries, there is no 'extended' coverage for an intentional injury under the endorsement" *Id.* at 418. The supreme court found the endorsement was unambiguous and clearly limited. *Id.* The conflict between the intentional injury exclusion and the endorsement is solved by applying the clear language of the corporal punishment coverage endorsement. *Id.*

69. *Id.* at 418.

The court then analyzed the school district insurer's liability under the insurance policy. The Minnesota Supreme Court found the trial court erred by refusing to grant partial summary judgment in favor of the school district's insurer.⁷⁰ The school district's insurance policy also contained an intentional injury exclusion.⁷¹ The exclusion language under the school district's policy in this case was identical to language analyzed in *Fireman's Fund Insurance Co. v. Hill*.⁷² Consequently, the supreme court held the school district's insurer was entitled to summary judgment on its duties to defend and indemnify the teacher.⁷³

The court then considered the school district's duty to defend and indemnify the teacher. The court held that, under Minnesota Statutes, sections 127.03, subdivision 2 and 466.07, subdivision 1a, the school district had an absolute duty to defend the teacher.⁷⁴ The court did, however, hold that despite this duty to defend the teacher, the school district was not required to indemnify the teacher for the teacher's intentional malfeasance.⁷⁵ The court cited⁷⁶ Minnesota Statutes section 466.07, subdivision 1a, which states, "The provisions of this

70. *Id.* at 419.

71. *Id.*

72. *Id.*; *Hill*, 314 N.W.2d 834. In *Hill*, an insurance company brought a declaratory judgment action to determine whether sexual activities engaged in by its insured were covered under a homeowner's policy. *Id.* at 834. The insured was alleged to have had sexual contact with one of his foster children. *Id.* at 835. The *Hill* court stated:

Under the policy Fireman's agreed to pay, on behalf of the insured, all damage for which the insured became liable because of bodily injury or property damage caused by an occurrence. An occurrence was defined as an *accident* which results in bodily injury or property damage. The policy excluded from coverage "bodily injury or property damage which is either expected or intended from the standpoint of the insured."

Id. (emphasis added).

73. *Horace Mann*, 355 N.W.2d at 419.

74. *Id.* at 420. Section 127.03, subdivision 2 of Minnesota Statutes provides as follows:

Upon written request of the teacher involved, any school district, however organized, shall provide legal counsel for any school teacher against whom claim is made or action is brought for recovery of damages in any tort action involving physical injury to any person or property or for wrongful death arising out of or in connection with the employment of such teacher with such school district.

MINN. STAT. § 127.03, subd. 2 (1984).

75. *Horace Mann*, 355 N.W.2d at 420-21. The supreme court noted there was confusion whether the indemnity issue was before them as a trial court ruling, but deemed the issue submitted to them. *Id.* at 420 n.8.

76. *Id.* at 421.

subdivision requiring indemnification do not apply in the case of malfeasance in office or willful or wanton neglect of duty.”⁷⁷

The school district claimed it should then be excused from liability under the municipal tort liability act⁷⁸ because it did not have insurance coverage after the court’s ruling.⁷⁹ The Minnesota Supreme Court rejected this claim. First, the court found the district’s insurer would still be responsible for defending and indemnifying the school district for the district’s own negligence in hiring and retaining the teacher.⁸⁰

Second, the court held that, by procuring insurance, the school district waived its right to assert sovereign immunity. The court stated:

[B]ecause the district attempted to obtain liability insurance to cover the district and its employees, it has waived “the defense of governmental immunity to the extent of the liability stated in the policy.” Thus, the procurement of insurance coverage waives the immunity defense up to the policy limits even though the employee’s tort may be subject to a policy exclusion.⁸¹

This latter statement could have troubling implications for school districts who find themselves in the precarious position of being insured yet defending an action covered by a policy exclusion. Under the supreme court’s latest dictum, the school

77. Subdivision 1a in its entirety provides:

Each municipality or any instrumentality thereof shall indemnify and provide defense for any employee or officer against judgments or any amounts paid in settlement actually and reasonably incurred in connection with any tort claim or demand arising out of an alleged act or omission occurring within the scope of his employment or official duties, subject to the limitations set forth in section 466.04.

The provisions of this subdivision requiring indemnification do not apply in the case of malfeasance in office or willful or wanton neglect of duty. MINN. STAT. § 466.07, subd. 1a (1984).

78. *Id.* §§ 466.01-.15 (1984). The municipal tort liability act regulates school district liability, immunity, and insurance and provides caps for damages. *Id.*

79. *Horace Mann*, 355 N.W.2d at 420.

80. *Id.* The supreme court noted that the issue before it did not concern the school district’s own liability, but the school district’s liability to indemnify against the teacher’s liability. *Id.* The *Horace Mann* court ultimately held the school district did not have a duty to indemnify against the teacher’s misconduct. The supreme court stated, “When an adult teacher-counselor engaged in sexual contact with a 16-year-old student, the exception of section 466.07, subd. 1a applies as a matter of law.” *Id.* at 421; see *supra* note 77 and accompanying text. The court therefore ordered summary judgment in favor of the school district regarding its duty to indemnify. *Horace Mann*, 355 N.W.2d at 421.

81. *Horace Mann*, 355 N.W.2d at 420-21 (citations omitted).

district will be liable up to the amount of the insurance coverage regardless of whether that insurance coverage applies in that particular matter. Thus, a school district should be very cautious in procuring insurance. A school district will not be able to claim the defense of sovereign immunity even when the insurance it has procured does not apply to a particular situation because of an exclusion in the policy.

C. School Board Immunity

One of the most interesting recent education cases is *Freier v. Independent School District No. 197*.⁸² In *Freier*, a teacher who was discharged for misconduct and insubordination brought an action against the school district and school board members. The teacher alleged three causes of action: (1) defamation; (2) intentional infliction of emotional distress; and (3) negligent infliction of emotional distress.⁸³ The teacher's claims were based upon the school board's decision to publish the order dismissing the teacher.⁸⁴

In the district court, the defendants moved for summary judgment claiming they were protected by an absolute privilege to publish their order.⁸⁵ The trial court denied summary judgment in favor of the school board members who voted against publishing the order.⁸⁶ The trial court held the other school board members and the school board itself were not covered by an absolute privilege to publish the order but certified the question to the Minnesota Court of Appeals.⁸⁷

The Minnesota Court of Appeals held that the school board and its members were protected by an absolute privilege in publishing the teacher's termination order.⁸⁸ The privilege was based on: (1) an absolute judicial privilege because the

82. 356 N.W.2d 724 (Minn. Ct. App. 1984).

83. *Id.* at 726-27.

84. *Id.* The teacher was dismissed in January 1981, but the school board's decision was reversed by the district court which was summarily affirmed by the Minnesota Supreme Court in 1982. *Id.* The school board's decision and order contained references to the events leading to the teacher's dismissal, including his touching and spanking of his elementary school students. *Id.* at 727.

85. *Id.*

86. *Id.*

87. *Id.* The trial court found the school board members voted in favor of publication. Consequently, the school board was protected only by a qualified privilege. *Id.*

88. *Id.* at 733.

board was acting in a quasi-judicial capacity;⁸⁹ (2) an absolute privilege to follow laws requiring the publication of the order;⁹⁰ and (3) an absolute privilege of the board to carry out its discretionary functions.⁹¹ The court stated, "If there is no absolute immunity protecting school board members from liability and defamation for their decision to discharge a teacher, school board members will have a strong incentive to ignore complaints about employees, in order to avoid any risk of exposure to liability."⁹²

The *Freier* court correctly applied absolute immunity in this situation in order to ensure that school boards may adequately perform their functions. By balancing the interests of the public good against those of wrongfully terminated teachers, the court of appeals determined the protection of school children was paramount. The case, therefore, insulates school boards from the extraneous and inhibiting fear of potential defamation liability.

Recent developments in the areas of tort liability, standard of care for school districts, school districts' duty to defend and indemnify in tort actions, and school board immunity have not

89. In applying this principle, the *Freier* court's crucial finding was that the school board's dismissal procedure constituted a quasi-judicial proceeding. The *Freier* court listed five characteristics which made a teacher termination proceeding quasi-judicial in nature: (1) the board had the power to issue subpoenas; (2) the board could administer oaths; (3) the board could order the production of records and documents; (4) the board was required to make charges against a teacher in writing and provide the teacher with an opportunity to be heard; and (5) the board's decision was subject to judicial review. Thus, the school board and its members could not be sued for their actions and communications made in relation to Freier's termination.

Popovich & Niles, *School Board Immunity From Libel Actions*, 21 Educ. L. Rep. (West) 1099, 1100 (1985); see *Freier*, 356 N.W.2d at 729.

90. See MINN. STAT. §§ 13.43, subd. 2; 125.12, subd. 10 (1984) (requiring publication once the school board makes its decision); see also *Freier*, 356 N.W.2d at 729-30 (once school board voted to discharge teacher, it was required to publish its decision by two different laws and, thus, school board members who made such decision were protected by absolute privilege to follow requirements of law).

91. *Freier*, 356 N.W.2d at 728-31. The court of appeals held the trial court, in finding a qualified privilege, erroneously relied upon federal civil rights case law. *Id.* at 731.

The court of appeals applied *Freier* to the facts in *Grossman v. School Board of Indep. School Dist. No. 640*, 389 N.W.2d 532 (Minn. Ct. App. 1986). A teacher sued the school district for defamation regarding publication of a letter alleging improper conduct. The court found an absolute privilege did exist based upon the second and third *Freier* grounds.

92. *Freier*, 356 N.W.2d at 732. The court of appeals elaborated that those suffering the greatest risk from this chilling effect would be the school children. *Id.* at 733.

taken any drastic turns. The cases in this area over the last four years represent a progressive development in application of existing law to new fact situations.

II. COMPULSORY EDUCATION—HOME SCHOOLS AND TRUANCY

The status of compulsory education in Minnesota has undergone significant changes in the last year and a half. The statute requiring compulsory education has been held unconstitutional by the Minnesota Supreme Court, and the laws governing truancy have been significantly limited by the Minnesota Court of Appeals.

A. Home Schools

State v. Newstrom,⁹³ involved the criminal conviction of Jeanne Newstrom for violation of the 1984 version of Minnesota Statutes section 120.12, subdivision 3. This statute was Minnesota's compulsory school attendance law at the time of Newstrom's conviction. Newstrom had removed both of her young children from public school to teach them at home. The Newstroms notified the local school superintendent of their actions, and the superintendent filed a complaint against Jeanne Newstrom charging her with the misdemeanor of willful non-compliance with section 120.12, subdivision 3.⁹⁴ At trial, the state argued Newstrom had not complied with subdivision 3, the compulsory attendance law, because the Newstroms' school did not meet the statutory definition of a school.⁹⁵ The relevant statute, Minnesota Statutes section 120.10, subdivision 2 then provided:

A school, to satisfy the requirements of compulsory attendance, must be one: (1) in which all the common branches are taught in the English language, from textbooks written in the English language, and taught by teachers whose qualifications are essentially equivalent to the minimum standards for public school teachers of the same grades or subjects and (2) which is in session each school year for at least 175 days or their equivalent. . . .⁹⁶

93. 371 N.W.2d 525 (Minn. 1985).

94. *Id.* at 526.

95. *Id.* at 527.

96. MINN. STAT. § 120.10, subd. 2 (1984). The state argued that Newstrom lacked the required formal education training. See *Newstrom*, 371 N.W.2d at 526.

The central issue in Newstrom's trial concerned her qualifications as a teacher.⁹⁷ The state argued Newstrom's qualifications were not "essentially equivalent to the minimum standards for public school teachers of the same grades or subjects" because she had not received a baccalaureate degree and had not completed a course of study approved by the Minnesota Board of Teaching.⁹⁸ These are the requirements a public school teacher must meet for certification.⁹⁹

The trial court rejected Newstrom's proffered testimony concerning her children's performance on standardized national tests.¹⁰⁰ It also refused to accept testimony from a teacher and a doctor of education who would have testified that Newstrom's qualifications were essentially equivalent to the minimum standards for public school teachers.¹⁰¹ The trial court "disallowed evidence bearing upon how she taught, test results which indicated how well she taught, her life experiences as relevant to her educational knowledge, her philosophy of education, her reasons for teaching her children at home, and the effectiveness of her children's home schooling."¹⁰² The trial court also rejected evidence and argument of Newstrom's good faith and her attorney's attempt to argue that her experience, knowledge and performance were relevant to the issue of "essential equivalence."¹⁰³ Jeanne Newstrom was found guilty, and the trial court imposed a sentence of 30 days in jail or payment of a \$300 fine and a \$30 surcharge.¹⁰⁴ Her conviction was affirmed by a three-judge district court panel. The Minnesota Supreme Court granted discretionary review.¹⁰⁵

The Minnesota Supreme Court held that Minnesota Statutes section 120.10, subdivision 2 was unconstitutional because the term "essentially equivalent" was unconstitutionally vague.¹⁰⁶ The court stated:

97. *Newstrom*, 371 N.W.2d at 527.

98. *See id.* at 526.

99. *See* 5 MINN. CODE AGENCY R. §§ 3.041, 3.0501 (1982) (now published at MINN. R. 8700.2700, 8700.2900 (1985)).

100. *Newstrom*, 371 N.W.2d at 527.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *See id.* at 527, 533.

Both principles underlying the requirement of definiteness—that ordinary people can understand what conduct is prohibited and that the statute does not encourage arbitrary and discriminatory enforcement—are violated by the language of the statute before us. “Essentially equivalent” is at best an ambiguous term. It has no common law meaning nor is it a term of art with an established meaning.¹⁰⁷

The Minnesota Supreme Court refused to give the statute a limited construction to uphold its constitutionality.¹⁰⁸ The court went on to discuss the various interests at stake in framing a statute.¹⁰⁹ The supreme court concluded the legislature must redefine qualifications necessary to comply with the compulsory attendance law.¹¹⁰ The court stated:

We do not mean to suggest that under no circumstances could parents’ interest in directing their child’s education ever outweigh the state’s interest in enforcing its compulsory attendance laws or other regulations, or that “home” schooling is not an option that the legislature could or should make more available to children and their parents under certain conditions. . . . When the state imposes criminal penalties, however, citizens are constitutionally guaranteed that the offense be defined in the statute with sufficient clarity to permit them to understand the nature of the conduct prohibited.¹¹¹

The court reasoned that the problem of defining “essentially equivalent” would be with the legislature and that it is the legislature’s task to implement compulsory education policies.¹¹²

In response to *Newstrom*, the 1986 Minnesota Legislature removed the language “taught by teachers whose qualifications

107. *Id.* at 528. The *Newstrom* court relied on *Kolender v. Lawson*, 461 U.S. 352 (1983), in which the United States Supreme Court explained:

As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

Kolender, 461 U.S. at 357. In writing the compulsory school attendance law, “the legislature chose a term which implies a judgment without indicating who is to make the judgment or what criteria are to be used except that the qualifications are to be ‘essentially equivalent.’” *Newstrom*, 371 N.W.2d at 528. That vagueness rendered the statute unconstitutional.

108. See *Newstrom*, 371 N.W.2d at 529.

109. See *id.* at 530-31.

110. *Id.* at 533.

111. *Id.* at 532.

112. See *id.* at 533.

are essentially equivalent to the minimum standards for public school teachers of the same grades or subjects.”¹¹³ The legislature also promulgated Minnesota Statutes section 120.10, subdivisions 2a and 2b.¹¹⁴ These sections, effective only through June 30, 1988,¹¹⁵ permit children to be instructed primarily in the home provided the parent reports by October 1 of each year the name, address, and age of the child to the superintendent of the district in which the child resides. Subdivision 2b permits a parent to teach the child in the home provided the instruction meets the remaining requirements of subdivision 2.¹¹⁶ Subdivision 2b prevents any civil or criminal proceedings against the parent complying with subdivision 2b.¹¹⁷

The legislature also created a compulsory school attendance task force to make recommendations about compulsory attendance laws.¹¹⁸ The task force is directed to address several issues including “alternative ways to comply with the definition of a school.”¹¹⁹ The task force recommendations are due before the legislature by February 1, 1987.¹²⁰ Presumably, after the compulsory school attendance task force makes its recommendations, the legislature will pass further legislation in an attempt to clarify what requirements must be met to teach a child in the home.

Newstrom has greatly expanded the possibilities for home ed-

113. See Act of April 1, 1986, ch. 472, § 1, 1986 Minn. Laws 1078, 1079.

114. Subd. 2a. [REPORTS ABOUT INSTRUCTION IN A HOME.] If a parent of a child required to attend school, according to subdivision 1, is providing for instruction of the child primarily in a home, the parent shall report by October 1 each year the name, address, and age of the child to the superintendent of the district in which the child resides. The parent shall not be required to report other information to the superintendent.

Id. § 2, 1986 Minn. Laws at 1079.

Subd. 2b. [PROTECTION FOR INSTRUCTION IN A HOME.] A parent of a child required to attend school, according to subdivision 1, may provide for instruction of the child in a home if the instruction meets the requirements of subdivision 2. Civil or criminal proceedings shall not be commenced under section 120.10, 120.12, 127.20, chapter 260, or similar law against a parent complying with this subdivision as a result of providing for instruction in a home.

Id. § 3, 1986 Minn. Laws at 1079.

115. See *id.* § 5, 1986 Minn. Laws at 1080.

116. For the text of subdivision 2b, see *supra* note 114.

117. *Id.*

118. See Act of April 1, 1986, ch. 472, § 4, 1986 Minn. Laws at 1079.

119. See *id.*

120. See *id.*

ucation. While those taught at home generally still must be instructed in the English language and from English language textbooks for at least 175 days of the year, specific qualifications for teachers have not been established. A return of required qualifications may be seen after recommendations are made by the newly created task force. Practitioners should be alert for further legislation.

B. Truancy

In *In re L.Z.*,¹²¹ the Minnesota Court of Appeals addressed several cases involving habitual a truancy under Minnesota Statutes section 120.10.¹²² *L.Z.* involved the adjudication of three juveniles for delinquency. The court held that in order to establish truancy, the truancy had to "be proven beyond a reasonable doubt."¹²³ Proof of truancy consisted of two elements: "First, the fault in 'absenting himself' must be shown. . . . Second, the absences must be 'without lawful excuse.'"¹²⁴ The court of appeals held the evidence in each of the cases was insufficient to support an adjudication of truancy.¹²⁵ The court of appeals rejected admission of school attendance records because the records violated the juveniles' right of confrontation and cross-examination.¹²⁶

The Minnesota Supreme Court subsequently held school attendance records are admissible to establish school absences if a proper foundation is laid.¹²⁷ The records can be used to show the child's absence on a particular day, whether a parental excuse was offered, and the substance of that excuse.¹²⁸ If the school rejected a facially valid excuse, the school attendance records will be inadmissible.¹²⁹

121. 380 N.W.2d 898 (Minn. Ct. App. 1986), *aff'd in part and rev'd in part*, No. C7-85-1357 (Minn. Nov. 21, 1986).

122. MINN. STAT. § 120.10, subd. 3 (1984); *see id.* § 260.015, subd. 19 (definition of habitual truancy).

123. *See L.Z.*, 380 N.W.2d at 902.

124. *Id.* (quoting MINN. STAT. § 260.015, subd. 19).

125. *Id.*

126. *See id.* at 904-06.

127. *L.Z.*, No. C7-85-1357, slip op. at 8-9 (Minn. Nov. 21, 1986) (must show records were "prepared in accordance with clear, adequate, and reliable policies and procedures consistent with the law defining habitual truancy").

128. *Id.* at 9-10.

129. *Id.* at 10. The school's evaluation of the truthfulness of the excuse erodes the reliability necessary for admission of hearsay evidence. The records become inad-

Despite admissibility of the records to demonstrate unlawful excuse, the state must still prove beyond a reasonable doubt that the child's absence was volitional by introducing testimony regarding the child's excuse for the absence.¹³⁰ To avoid an inference of volitional conduct, the student may present contrary evidence.¹³¹ If the contrary evidence is sufficient, the student cannot be adjudged a habitual truant.¹³²

The adoption of a beyond a reasonable doubt standard in truancy cases may restrict the state's ability to enforce truancy laws. The state must now show something more than habitual absence. It must affirmatively demonstrate fault and lack of excuse. Overall, recent cases dealing with truancy and compulsory education appear to have significantly reduced the enforceability statutes imposing compulsory public education.

III. OPEN MEETING LAWS AND SCHOOL CLOSINGS

Four interesting cases have arisen in the areas of open meeting laws and school closings in recent years.

A. Open Meeting Laws

In *St. Cloud Newspapers, Inc. v. District 742 Community Schools*,¹³³ the Minnesota Supreme Court held that gatherings of all members of the school board and district administrators for the purpose of providing board members with information concerning current educational issues were meetings under the Minnesota Open Meeting Law.¹³⁴ In September 1980 and August 1981, school board members held meetings for which no public notice was given.¹³⁵ Appellants, *St. Cloud Newspapers*, brought an action in district court seeking to have the court

missible and the student must be permitted to confront the person making the adverse judgment. *Id.* at 7, 10.

130. *See id.* at 11. A student will not be adjudged a truant if merely obeying a parent's wrongful command to remain at home. *Id.* at 5.

131. *Id.* at 12.

132. The supreme court affirmed the trial court's determination of habitual truancy regarding two of the students. The truancy determination of the third student was reversed because the state failed to demonstrate the student's volitional conduct. The third student had moved to live with his mother in a different school attendance district. The mother had failed to enroll the child in the new school or arrange for his continued attendance at his old school. *See id.* at 12-14.

133. 332 N.W.2d 1 (Minn. 1983).

134. *See id.* at 7.

135. *See id.* at 2-3.

declare that the school district superintendent and school board members had violated the state's open meeting law.¹³⁶ The trial court determined that none of the occasions constituted meetings as defined by the Minnesota Open Meeting Law.¹³⁷

The meetings in question were conducted as seminars in

136. *See id.*

137. *Id.* at 2. The Minnesota Open Meeting Law states in pertinent part:

Subdivision 1. Except as otherwise expressly provided by statute, all meetings, including executive sessions, of any state agency, board, commission or department when required or permitted by law to transact public business in a meeting, and the governing body of any school district however organized, unorganized territory, county, city, town, or other public body, and of any committee, subcommittee, board, department or commission thereof, shall be open to the public, except meetings of the board of pardons and the commissioner of corrections. The votes of the members of such state agency, board, commission or department or of such governing body, committee, subcommittee, board, department or commission on any action taken in a meeting herein required to be open to the public shall be recorded in a journal kept for that purpose, which journal shall be open to the public during all normal business hours where such records are kept. The vote of each member shall be recorded on each appropriation of money, except for payments of judgments, claims and amounts fixed by statute. This section shall not apply to any state agency, board, or commission when exercising quasi-judicial functions involving disciplinary proceedings.

Subd. 1a. Subdivision 1 does not apply to a meeting held pursuant to the procedure in this subdivision. The governing body of a public employer may by a majority vote in a public meeting decide to hold a closed meeting to consider strategy for labor negotiations, including negotiation strategies or developments or discussion and review of labor negotiation proposals, conducted pursuant to sections 179A.01 to 179A.25. The time of commencement and place of the closed meeting shall be announced at the public meeting. A written roll of members and all other persons present at the closed meeting shall be made available to the public after the closed meeting. The proceedings of a closed meeting to discuss negotiation strategies shall be tape recorded at the expense of the governing body and shall be preserved by it for two years after the contract is signed and shall be made available to the public after all labor contracts are signed by the governing body for the current budget period.

If an action is brought claiming that public business other than discussion of labor negotiation strategies or developments or discussion and review of labor negotiation proposals was transacted at a closed meeting held pursuant to this subdivision during the time when the tape is not available to the public the court shall review the recording of the meeting in camera. If the court determines that no violation of this section is found, the action shall be dismissed and the recording shall be preserved in the records of the court until otherwise made available to the public pursuant to this section. If the court determines that a violation of this section is found, the recording may be introduced at trial in its entirety subject to any protective orders as requested by either party and deemed appropriate by the court.

The prevailing party in an action brought before or after the tape is made available to the public which establishes that a violation of this section has occurred shall recover costs and reasonable attorney's fees as determined by the court.

Subd. 1b. In any meeting which under subdivision 1 must be open to the public, at least one copy of any printed materials relating to the agenda

nearby motels.¹³⁸ Generally, one person would present a paper and then there would be discussion of the topic.¹³⁹ Topics included long range planning, enrollment decline, goals of the board of education and other miscellaneous topics.¹⁴⁰ The meetings were attended by school board members, district administrators, secondary school principals and the superintendent of schools.¹⁴¹ The Minnesota Supreme Court was faced with three issues: (1) whether the seminars constituted meetings under the Minnesota Open Meeting Law; (2) whether the Minnesota Open Meeting Law was unconstitutionally vague or overbroad; and (3) whether the superintendent of schools was subject to the penalties of the Minnesota Open Meeting Law.¹⁴²

School officials claimed the seminars were not meetings under the Minnesota Open Meeting Law because there were no deliberations on pending matters, no decisions were made, and there was no attempt to reach a consensus on any of the matters being discussed.¹⁴³ The trial court adopted this interpretation, holding that the statute did "not include 'seminars' at which factual information [was] presented."¹⁴⁴ The Minnesota Supreme Court reversed, holding that the seminars did constitute meetings under the Minnesota Open Meeting

items of the meeting which are prepared or distributed by or at the direction of the governing body or its employees and which are:

- (1) distributed at the meeting to all members of the governing body;
- (2) distributed before the meeting to all members; or
- (3) available in the meeting room to all members;

shall be available in the meeting room for inspection by the public. The materials shall be available to the public while the governing body considers their subject matter. This subdivision does not apply to materials classified by law as other than public as defined in chapter 13, or to materials relating to the agenda items of a closed meeting held in accordance with the procedures in subdivision 1a or other law permitting the closing of meetings. If a member intentionally violates the requirements of this subdivision, that member shall be subject to a civil penalty in an amount not to exceed \$100. An action to enforce this penalty may be brought by any person in any court of competent jurisdiction where the administrative office of the member is located.

MINN. STAT. § 471.705 (1984). The remaining subdivisions provide sanctions for failure to comply (subd. 2) and the act's title (subd. 3).

138. *St. Cloud Newspapers*, 332 N.W.2d at 2-3.

139. *See id.*

140. *See id.*

141. *See id.*

142. *See id.*

143. *See id.* at 4.

144. *Id.*

Law.¹⁴⁵

The supreme court first discussed the purpose of the Minnesota Open Meeting Law.¹⁴⁶ The court concluded that the purpose of the Minnesota Open Meeting Law was (1) to prevent public bodies from taking secret actions, (2) to guarantee the public's right to be informed, and (3) to ensure the public would have an opportunity to present its views.¹⁴⁷ In effectuating these purposes, the Minnesota Supreme Court stated that "open meeting statutes are enacted for the public benefit and are to be construed most favorably to the public."¹⁴⁸ The court discussed how other states have dealt with the open meeting question.¹⁴⁹ Minnesota, it said, has adopted an open meeting law whereby "everything not specifically closed is open."¹⁵⁰ After comparing this position with other states' positions that every meeting not specifically open is closed, the court concluded openness in government was a superior policy and that limits to openness should be carefully and narrowly defined.¹⁵¹

The court went on to recognize a narrow exception to the

145. *Id.* at 8. Justice Simonett concurred in part and dissented in part and was joined by Justice Kelley. Justice Simonett noted that "[t]he decisionmaking process advances along a continuum." *Id.* at 8 (Simonett, J., concurring in part and dissenting in part). He dissented regarding one of the involved seminars concluding it did not violate the open meeting law because "[t]he school board was not meeting as a board to transact public business." *Id.* at 9. He stated:

In my view, if board members meet with administrators or others for background information and general study, and specific district problems are mentioned, if at all, only in an illustrative sense, this kind of gathering is not a meeting as contemplated by Minn. Stat. § 471.705 (1982). The seminar-type discussion that takes place at such a meeting is not the kind that ordinarily and appropriately occurs at an open public meeting. Nor is it the type of discussion that impairs the public's right of input in the decision making process, since it occurs at such a remote stage of that process. Neither is it the type of discussion that impairs the public's right "to become fully informed concerning board decisions," nor is it the kind of discussion that lends itself to "improper influences."

Id. (citations omitted).

146. *See id.* at 4-5.

147. *Id.* at 4. The supreme court noted that "[n]either the legislature nor this court has defined the term 'meeting' as used in Minn. Stat. § 471.705." *Id.*

148. *Id.* *See generally* Note, *The Minnesota Open Meeting Law After Twenty Years—A Second Look*, 5 WM. MITCHELL L. REV. 375 (1979) (analyzing the Minnesota statute in relation to those of other states).

149. *St. Cloud Newspapers*, 332 N.W.2d at 5 (state legislatures must choose to either close everything not specifically open, or open everything not specifically closed).

150. *Id.*; *see* MINN. STAT. § 471.705, subd. 1.

151. *St. Cloud Newspapers*, 332 N.W.2d at 5 (quoting Little & Tompkins, *Open Government Laws: An Insider's View*, 53 N.C.L. REV. 451, 475 (1974)).

open meeting law for attorney-client meetings.¹⁵² The court specifically limited this exception stating, "The Minnesota legislature clearly intended that *all* meetings of public agencies be open, with rare and carefully restrained exception."¹⁵³ With the background of the Minnesota Open Meeting Law presented, the court addressed whether these particular seminars constituted meetings under the open meeting law.¹⁵⁴ The court stated, "The statute will be liberally construed in order to protect the public's right to full access to the decision-making process of public bodies governed by section 471.705. This includes meetings at which information is received which may influence later decisions of such bodies."¹⁵⁵ The court concluded the seminars in *St. Cloud Newspapers* were meetings under the Minnesota Open Meeting Law.¹⁵⁶

The court limited this holding stating, "the Minnesota Open Meeting Law does not apply to chance or social gatherings."¹⁵⁷ The court also noted that in a recent case, *Hubbard Broadcasting*,

152. *Id.* at 5. That exception was created by the supreme court in *Minneapolis Star & Tribune Co. v. The Housing and Redevelopment Auth.* in and for the City of Minneapolis, 310 Minn. 313, 251 N.W.2d 620 (1976). There, the newspaper sought access to a meeting between the housing agency and its attorney. The meeting was for the purpose of discussing litigation strategy regarding a case in which the agency and one of its members were defendants. *Id.* at 314-15, 251 N.W.2d at 621. The supreme court concluded that the open meeting law and the attorney-client privilege were compatible and concurrent and that the meeting should be closed. *Id.* at 322, 251 N.W.2d at 625. But the supreme court cautioned:

We cannot emphasize too strongly that should this exception be applied as a barrier against public access to public affairs, it will not be tolerated, for this court has consistently emphasized that respect for and adherence to the First Amendment is absolutely essential to the continuation of our democratic form of government. It will be upheld, however, if the balancing of the conflicting public policies dictates the need for absolute confidentiality. The exception is therefore available to satisfy the concerns expressed herein but is to be employed or invoked cautiously and seldom in situations other than in relation to threatened or pending litigation.

Id. at 324, 251 N.W.2d at 626.

153. *St. Cloud Newspapers*, 332 N.W.2d at 5 (emphasis in original). The dissent states that "to allow exceptions to the open meeting law raises the fear that the exceptions will be abused." *Id.* at 8 (Simonett, J., concurring in part and dissenting in part).

154. *Id.* at 6.

155. *Id.*

156. *Id.* The court stated the discussions at those seminars concerned topics "which could foreseeably require final action by the board." *Id.*

157. *Id.* at 7. The court also explained that the open meeting law does not prohibit meetings of public bodies, but merely requires that affected gatherings must be open to the public. *See id.*

Inc. v. City of Afton,¹⁵⁸ the court had held that a meeting between two city council members was not a violation of the Minnesota Open Meeting Law.¹⁵⁹

The court next held that the open meeting law did not violate the rights of free speech or free assembly under the first amendment of the United States Constitution because the state's compelling interest in prohibiting secret government action outweighed any minimal intrusion on the first amendment rights of public officials.¹⁶⁰ The court noted, however, that the Minnesota Open Meeting Law did not apply to the superintendent of schools because he was an *ex officio* member of the school board.¹⁶¹

St. Cloud Newspapers helped resolve some questions surrounding what types of meetings constitute a meeting under the Minnesota Open Meeting Law. It did not, however, define when a gathering would be considered a meeting or how many members of an organization are needed to constitute a meeting under the Minnesota Open Meeting Law.

Those questions were addressed in *Moberg v. Independent School District No. 281*.¹⁶² *Moberg* involved a declaratory judgment action brought by taxpayers.¹⁶³ The taxpayers requested (1) that the school district be enjoined from closing a school and (2) a declaratory judgment that board members had acted in violation of the open meeting laws.¹⁶⁴ The school district in *Moberg* found it necessary to close one of three high schools, but the board could not reach a consensus on which school to close.¹⁶⁵ After a deadlock among the school board members and several hearings on the issue, the school board appointed

158. 323 N.W.2d 757 (Minn. 1982). In *Hubbard*, two city council members discussed an application for a special use permit regarding construction of a satellite station during lunch. The supreme court held that discussion did not violate the open meeting law. *Id.* at 765.

159. *Id.*; see *St. Cloud Newspapers*, 332 N.W.2d at 6 n.2.

160. See *St. Cloud Newspapers*, 332 N.W.2d at 7. "These rights protect expression of ideas, not the right to conduct public business in closed meetings." *Id.*

161. See *id.* at 8; see also *Minnesota Educ. Ass'n v. Bennett*, 321 N.W.2d 395, 397-98 (Minn. 1983) (holding "a school superintendent is not a member of the school board for purposes of the Open Meeting Law").

162. 336 N.W.2d 510 (Minn. 1983). For an excellent review of *Moberg*, *St. Cloud Newspapers*, and the Open Meeting Law, see generally Note, *What Constitutes a "Meeting" Under the Minnesota Open Meeting Law?*, 11 WM. MITCHELL L. REV. 251 (1985).

163. *Moberg*, 336 N.W.2d at 512.

164. See *id.*

165. See *id.*

a neutral factfinding body to recommend which school to close.¹⁶⁶

While the factfinding commission was conducting its investigation, each of the board members contacted other board members to persuade them to vote in a certain way.¹⁶⁷ The trial court found that board members gathered in private on at least seventeen occasions to discuss the school closing issue.¹⁶⁸ The trial court also determined that the board violated the open meeting law by conducting numerous telephone conversations with other board members about the school closing.¹⁶⁹ The trial court concluded there were fourteen separate violations of the open meeting law.¹⁷⁰

On appeal, the Minnesota Supreme Court was faced with two issues: (1) did the board members violate the hearing and notice provisions of the school closing law; and (2) did the trial court properly define meetings under the open meeting law as two or more members engaging in deliberations on board business?¹⁷¹

The *Moberg* appellants claimed the school district violated the school closing law because the appellants did not have an opportunity to comment upon the factfinding panel's recommendation before the school board made its final decision.¹⁷² The Minnesota Supreme Court rejected this argument holding that the notice and hearing provision of the school closing law "does not require an opportunity for rebuttal of all evidence or testimony."¹⁷³ The court found that the board complied with the statutory requirements by publishing the notice and receiv-

166. *Id.* at 513. The three schools were Robbinsdale Senior High School, Cooper Senior High School, and Armstrong Senior High School. Each school possessed varied favorable qualities making selection of which school to close difficult. After a deadlock was reached, the school board unanimously passed a motion proposing to close all three schools. The school board never seriously intended to close all three. At that same meeting, the factfinding panel was created. *See id.*

167. *See id.* at 514.

168. *See id.*

169. *Id.*

170. *Id.* at 514. A \$100 fine was imposed against each school board member pursuant to the statute. *See id.* (citing to Minn. Stat. § 471.705, subd. 2).

171. *Id.*

172. *Id.* at 514-15.

173. *Id.* at 515. The school board voted to reopen Cooper and Armstrong High Schools based on the recommendations of the factfinding panel. At that meeting no public comment was allowed. *Id.* at 514.

ing extensive public testimony at earlier stages.¹⁷⁴

The court then considered whether the trial court's definition of meetings as two or more members intentionally engaging in deliberations on school business was correct.¹⁷⁵ The court stated:

The Open Meeting Law, Minn. Stat. § 471.705 (1982), does not define the "meetings" to which its terms apply, and is therefore indefinite with respect to (1) the number of officials that constitute a meeting and (2) the kinds of activities that fall within the purview of the law.¹⁷⁶

The court found *Moberg* a ripe opportunity to deliver a comprehensive definition of "meeting" for purposes of the open meeting law.¹⁷⁷ The court first noted it had decided cases dealing with different extremes of the same issue under the open meeting law. The court noted the *St. Cloud Newspapers* holding that scheduled informational meetings were considered meetings under the open meeting law and its decision in *Hubbard Broadcasting* that "a discussion between two members of a governing body about a matter pending before that body is not a *per se* violation of the statute."¹⁷⁸ Thus, the *Moberg* court was forced to determine what proportion of public body greater than two members but less than the whole fell under

174. *Id.* at 515. The schoolhouse closing statute provides:

The board may close a schoolhouse only after a public hearing on the question of the necessity and practicability of the proposed closing. Published notice of the hearing shall be given for two weeks in the official newspaper of the district. The time and place of the meeting, the description and location of the schoolhouse, and a statement of the reasons for the closing shall be specified in the notice. Parties requesting to give testimony for and against the proposal shall be heard by the board before it makes a final decision to close or not to close the schoolhouse.

MINN. STAT. § 123.36, subd. 11 (1984).

The *Moberg* court concluded:

[I]nformation received after a public hearing may be considered, provided it is obtained in accord with the Open Meeting Law and the decision is based upon the reasons stated in the public notice and issues addressed in public hearings. . . . The fact-gathering and deliberation process may continue until the Board feels confident that it is adequately prepared to decide the matter. In this case, the Board, which has wide discretion in such matters, chose to weigh the panel's recommendations heavily in making its decision. It was also capable of discounting any possible errors contained in the panel's report without submitting it to another round of public debate.

Moberg, 336 N.W.2d at 515.

175. *Moberg*, 336 N.W.2d at 516.

176. *Id.*

177. *Id.*

178. *Id.*; see *St. Cloud Newspapers*, 332 N.W.2d at 7; *Hubbard Broadcasting*, 323 N.W.2d at 765.

the auspices of the open meeting law.¹⁷⁹

A majority of jurisdictions restrict their open meeting laws' application to a majority or quorum of a public body.¹⁸⁰ Since the Minnesota statute refers to a "governing body,"¹⁸¹ the court found that a quorum requirement was implicit in the Minnesota statute.¹⁸² The court believed that a quorum requirement served the legislative intent of balancing the legislative policy of making public bodies' decisions open while, at the same time, ensuring that public bodies are free to conduct their business.¹⁸³ The court stated:

"Meetings" . . . are those gatherings of a quorum or more members of the governing body, or a quorum of a committee, subcommittee, board department, or a commission thereof, at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body. Although "chance or social gatherings" are exempt from the requirements of the statute, the quorum may not, as a group, discuss or receive information on official business in any setting under the guise of a private social gathering. The statute does not apply to letters or telephone conversations between fewer than a quorum.¹⁸⁴

The court noted appellants' concern about the different possibilities for circumventing this definition of a meeting under the open meeting law.¹⁸⁵ The court stated, "There is a way to illegally circumvent any rule the court might fashion, and therefore it is important that the rule not be so restrictive as to lose the public benefit of personal discussion between public officials while gaining little assurance of openness."¹⁸⁶ The

179. See generally *Moberg*, 336 N.W.2d at 517 (while the statute clearly requires notice and an open meeting of the whole, it is not immediately clear whether the law applies to an informal discussion between a few members).

180. *Id.* (citing Note, *supra* note 148, at 390 n.70 & 72-73).

181. See MINN. STAT. § 471.705, subd. 1.

182. *Moberg*, 336 N.W.2d at 517. A quorum of a school board is a majority of its voting members. MINN. STAT. § 123.33, subd. 5. Less than a majority of the voting members cannot govern.

183. *Moberg*, 336 N.W.2d at 517. In *Moberg*, "great time pressure" required the board to reach a swift decision. The discussions between board members were efforts to break the time consuming deadlock. No covert purpose was intended. The conversations were efforts only to mobilize the decisionmaking process. *Id.*

184. *Id.* at 518 (citation omitted).

185. See *id.*

186. *Id.* The court continued, stating, "Of course, serial meetings in groups of less than a quorum for the purpose of avoiding public hearings or fashioning agree-

court further commented that it would continue to scrutinize all types of meetings depending upon the individual circumstances of each particular matter.¹⁸⁷ The court then concluded there were no violations of the open meeting law in *Moberg*.¹⁸⁸

Moberg represents a practical and comprehensive definition of meeting under the Minnesota Open Meeting Law. School boards and other public bodies now have sufficient guidance as to which types of gatherings will be considered meetings. A public body attempting to comply with the provisions of the open meeting law should have little difficulty under the *Moberg* definition. At the same time, however, the Minnesota Supreme Court did not preclude review of possible attempts to circumvent the open meeting law.

B. School Closings

With the tapering of population growth, many school districts have been faced with declining enrollment and the necessity of school closings. Schools may be closed "only after a public hearing on the question of the necessity and practicability of the proposed closing."¹⁸⁹ Notice of the hearing is required, and parties wanting to speak must be heard by the school board.¹⁹⁰ A school board's decision on this subject is given great deference on review provided the decision is supported by substantial evidence.¹⁹¹

In 1986, the Minnesota Court of Appeals reviewed two cases involving school closings. In *Bena Parent Association v. Independent School District No. 115*,¹⁹² the school district was operating

ment on an issue may also be found to be a violation of the statute depending upon the facts of the individual case." *Id.*

In *Grossman v. School Board of Indep. School Dist. No. 640*, 389 N.W.2d 532 (Minn. Ct. App. 1986) such a fact situation arose. Three board members met at one location, three met at another and one did not meet. The members at different locations communicated by telephone. The issue of whether this situation violated the open meeting law was not reached because the claim was dismissed without prejudice on procedural grounds. *Id.* at 536.

187. *Moberg*, 336 N.W.2d at 518.

188. *Id.*

189. MINN. STAT. § 123.36, subd. 11; see *Moberg*, 336 N.W.2d at 515.

190. See MINN. STAT. § 123.36, subd. 11. Notice must be published for two weeks in the district's official newspaper and must indicate the meeting's time and place, describe the school and its location and specify the reasons for closing. Testimony is required to be heard before a final decision is made. See *id.*

191. See *Moberg*, 336 N.W.2d at 515-16.

192. 381 N.W.2d 517 (Minn. Ct. App. 1986).

elementary schools within nineteen miles of each other in Bena and Cass Lake.¹⁹³ Enrollment decline and financial limitations forced consideration of closing Bena Elementary.¹⁹⁴ After a hearing, the school board decided to close the school.¹⁹⁵

The Bena Parent Association challenged the decision because of alleged procedural errors at the hearing.¹⁹⁶ The association claimed the school board should have employed an independent hearing officer.¹⁹⁷ The court of appeals rejected this argument because a school board is given broad discretion in school closing decisions, and its decision need not be based solely on hearing testimony.¹⁹⁸ Although stating "an independent hearing officer would provide additional benefits and safeguards in school closing hearings,"¹⁹⁹ the court concluded it was unnecessary to impose a due process requirement.²⁰⁰

The court of appeals also rejected the parent association's argument that the school superintendent was required to testify under oath and answer all questions posed because the requirements are not found in the school closing statute. An interested party's only statutory right is the opportunity to be heard.²⁰¹

The parent association also appealed the school board's substantive basis for decision. The parents requested the decision be set aside because no specific finding was made that the clos-

193. *See id.* at 518.

194. *See id.* at 518-19.

195. *See id.* Bena residents protested, emphasizing the quality of education provided at Bena Elementary and criticizing the long bus ride to Cass Lake. *Id.* at 519.

196. *See id.* at 520.

197. *See id.*

198. *Id.* at 520-21 (quoting *Moberg*, 336 N.W.2d at 515 and citing *Western Area Business and Civic Club v. Duluth School Board Indep. School Dist. No. 709*, 324 N.W.2d 361, 365 (Minn. 1982)).

199. *Id.* at 520.

200. *Id.* The court of appeals emphasized the distinction between school closings and teacher terminations where the school board acts in a quasi-judicial role. It concluded "there is not the same opportunity for arbitrary action against an individual" in school closings as is found in teacher termination cases. *Id.* at 521.

201. *Id.* at 520. Compare MINN. STAT. § 123.36, subd. 11 (testimony shall be heard in school closing) with MINN. STAT. § 127.31, subd. 8 (1984) (testimony must be under oath in pupil expulsion).

The court of appeals also concluded an administrator at a school closing hearing need not answer all questions. Interested persons must only be heard, not responded to. *Bena*, 381 N.W.2d at 520.

ing was necessary and practical.²⁰² The court of appeals held that the findings supported the board's decision and that the findings need not use the exact statutory language.²⁰³

Kelly v. Independent School District No. 623,²⁰⁴ involved an appeal from a school board's decision to close Kellogg High School in Little Canada in the Roseville School District. Before the final decision, a public hearing was held. On appeal, appellants complained the school board made its decision to close at a school board meeting prior to the public hearing at which a comprehensive plan calling for the school's closing was approved.²⁰⁵

The court of appeals analyzed Minnesota Statutes section 123.36, subdivision 11,²⁰⁶ and concluded that the statute did not specify the decisionmaking stage at which a public hearing must be held. The court determined the proposed closing under the comprehensive plan was not a final decision and that the statutory requirements were met by the public hearing held before the final decision.²⁰⁷

The *Kelly* appellants also challenged the sufficiency of the evidence. Appellants argued the reports and studies involved demonstrated a need to close a high school within the district,²⁰⁸ but that the evidence did not demonstrate the propriety of closing Kellogg instead of Ramsey High School.²⁰⁹ The court of appeals agreed, stating that no reflective findings were made to support the school board's choice of schools. The long-term welfare of the district should be considered and the basis for the choice must be expressed.²¹⁰

202. *Bena*, 381 N.W.2d at 520.

203. *Id.* at 519-20. "Although [Minn. Stat. § 123.36, subd. 11] implicitly requires a determination of necessity and practicability, there is no absolute requirement that those words be used." *Id.* at 519.

The court of appeals also held sufficient evidence supported the school board's decision. *Id.* at 520.

204. 380 N.W.2d 833 (Minn. Ct. App. 1986).

205. *Id.* at 835. Between adopting the comprehensive plan and holding the public hearing, the school board established a task force to assess grade reorganization. The board also reviewed letters from city officials, parent-teacher organizations and other residents. *Id.* at 834.

206. See *supra* note 174 (text of MINN. STAT. § 123.36, subd. 11).

207. See *Kelly*, 380 N.W.2d at 836. The school board could have reversed its decision to close the school if closure later was shown as not necessary or practicable. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* The school board claimed its decision was based in part on value judg-

These recent developments emphasize the great discretion allowed school boards in closing schools. While adequate findings are required, due process requirements do not severely restrict school boards' discretion.

IV. HIRING AND FIRING ISSUES

A. *Due Process and Other Procedural Considerations*

In recent years, the Minnesota courts have decided numerous cases addressing the procedural aspects of terminating or placing teachers on unrequested leaves of absence. Cases have dealt with issues such as the required notice of termination or proposed placement on unrequested leave of absence, the parties entitled to a hearing, and the type of hearing that must be afforded.

In *Finley v. Independent School District No. 566*,²¹¹ the Minnesota Court of Appeals reversed a school board's placement of a teacher on unrequested leave of absence because the school board had not provided a separate proposal to terminate the teacher. The court began, stating, "A continuing contract employee has a protected property interest which can only be terminated under the procedural requirements of Minn. Stat. § 125.12 (1982)."²¹²

The *Finley* school board terminated the teacher's position and later served notice on the teacher of proposed placement on unrequested leave of absence. The court held the school board had not followed the applicable procedure contained in Minnesota Statutes section 125.12²¹³ and stated, "The proce-

ments and "soft data," but the record failed to articulate those judgments or that data. *Id.* The court of appeals stated, "We realize that there may be subjective concerns and pressures that influence such a controversial decision, but unless they are part of the record we cannot consider them as support for the School Board's decision." *Id.* at 837.

211. 359 N.W.2d 749 (Minn. Ct. App. 1985). In *Finley*, the teacher had a continuing contract as an elementary principal. The school district voted to eliminate the separate position of elementary principal and establish a half-time principal position which would be assumed by the more senior district superintendent who was also licensed as an elementary principal. *Id.* at 750.

212. *Id.* at 751.

213. Minnesota Statutes section 125.12 provides:

Before a teacher's contract is terminated by the board, the board shall notify the teacher in writing and state its ground for the proposed termination in reasonable detail together with a statement that the teacher may make a written request for a hearing before the board within 14 days after receipt of such notification. Within 14 days after receipt of this notification the

dures set out in Minn. Stat. § 125.12 necessarily involves two separate decisions by a school board: (1) a decision to *propose* termination or demotion, and (2) a decision, after a hearing if requested, to *terminate or demote*.”²¹⁴ The court’s decision in *Finley* was also based on the court’s belief that the school board had improperly delegated its responsibility to propose placement of teachers on unrequested leave of absence to the superintendent of schools.²¹⁵

The type of notice which will satisfy the statutory requirement was discussed in *Forbes v. Independent School District No. 196*²¹⁶ and *Schmidt v. Independent School District No. 1*.²¹⁷ In *Forbes*, a substitute teacher was terminated for abandoning his teaching position for two days.²¹⁸ The teacher contended the school district’s three-day notice was inadequate and did not afford the teacher time to prepare for a hearing.²¹⁹ The court of appeals held the three-day notice was sufficient under the

teacher may make a written request for a hearing before the board and it shall be granted upon reasonable notice to the teacher of the date set for hearing, before final action is taken. If no hearing is requested within such period, it shall be deemed acquiescence by the teacher to the board’s action. Such termination shall take effect at the close of the school year in which the contract is terminated in the manner aforesaid. Such contract may be terminated at any time by mutual consent of the board and the teacher and this section shall not affect the powers of a board to suspend, discharge, or demote a teacher under and pursuant to other provisions of law.

MINN. STAT. § 125.12, subd. 4 (1984).

214. *Finley*, 359 N.W.2d at 751 (emphasis added). The requirement of adequate notice under section 125.12 was previously adhered to by the Minnesota Court of Appeals. See *Fisher v. Independent School Dist. No. 622*, 357 N.W.2d 152, 155 (Minn. Ct. App. 1984); *Ostlund v. Independent School Dist. No. 47*, 354 N.W.2d 492, 497 (Minn. Ct. App. 1984).

215. *Finley*, 359 N.W.2d 751-52. The court of appeals stated the authority to terminate a continuing contract teacher is not a ministerial duty which the school board may delegate. *Id.* at 751.

216. 358 N.W.2d 150 (Minn. Ct. App. 1984), *petition for rev. denied* (Minn. Mar. 13, 1985). The teacher had five conferences with school district administrators regarding his poor teaching performance. After the last conference, the teacher left his teaching post for two days without giving notice. The school district gave the teacher three days notice of its intended action. See *id.* at 151-52.

217. 349 N.W.2d 563 (Minn. Ct. App. 1984). The teacher received notice of proposed placement on unrequested leave of absence which stated, “[t]hat the grounds of said notice are within the grounds for unrequested leave placement as set forth in M.S. 125.12, Subdivision 6b, and are hereby adopted as fully as though separately set forth and resolved herein.” *Id.* at 564. He later received a notice of proposed termination which stated the grounds in essentially the same language. *Id.* at 565. The teacher was subsequently terminated. *Id.*

218. *Forbes*, 358 N.W.2d at 151.

219. *Id.* at 152.

circumstances.²²⁰ The court also held that unexcused absence from a substitute teaching position was not a factual issue requiring a formal hearing.²²¹

In *Schmidt*, a teacher contested the adequacy of the school board's written notice of proposed termination. The notice provided by the school board contained reference to the statute governing unrequested leave of absence, but did not state the specific grounds the school board was relying on in placing the teacher on unrequested leave of absence.²²² Citing several Minnesota Supreme Court decisions,²²³ the court of appeals held that the school board's incorporation and reference to the applicable statute was adequate notice.²²⁴

After a school board has provided a teacher with proper notice of proposed placement on unrequested leave of absence, the teacher may request a hearing.²²⁵ The teacher's request must be made within fourteen days after receipt of notice.²²⁶ Notice must be delivered to the school board.²²⁷ If a request is not made within that period, the teacher is deemed to have acquiesced in the school board's action.²²⁸

In *Roseville Education Association v. Independent School District No. 623*,²²⁹ the court of appeals analyzed the requirement of a request for hearing and its effect on subsequent placement on unrequested leave of absence. In *Roseville Education Associa-*

220. *Id.* at 153.

221. *Id.* The court of appeals stated the procedure "was adequate to meet the demands of due process for a substitute teacher alleged to have abandoned his position." *Id.* at 153.

222. *Schmidt*, 349 N.W.2d at 565.

223. See *id.* (citing *Herfindahl v. Independent School Dist. No. 126*, 325 N.W.2d 36, 39 (Minn. 1982); *Jordahl v. Independent School Dist. No. 129*, 302 Minn. 286, 292, 225 N.W.2d 224, 228 (1974); *Fisher v. Independent School Dist. No. 118*, 298 Minn. 238, 242, 215 N.W.2d 65, 68 (1974)).

224. *Id.* at 567.

225. See MINN. STAT. § 125.12, subd. 4. For salient text of the statute, see *supra* note 213.

226. MINN. STAT. § 125.12, subd. 4. The hearing shall be granted before final action is taken. *Id.*

227. See *Pinkney v. Independent School Dist. No. 691*, 366 N.W.2d 362, 364 (Minn. Ct. App. 1985). In *Pinkney*, an original copy of the teacher's notice to the school board was introduced at his hearing, but no showing was made of delivery of the notice to the board. The court of appeals held the teacher had failed to show a timely request for hearing had been made. *Id.* at 365.

228. See MINN. STAT. § 125.12, subd. 4.

229. 380 N.W.2d 512 (Minn. Ct. App. 1986), *aff'd in part and rev'd in part*, 391 N.W.2d 846 (Minn. 1986).

tion,²³⁰ the school board placed thirty-five teachers and two deans on unrequested leave of absence, and twenty-three teachers requested a hearing. Before a hearing, the school board rescinded the proposed leaves for the deans and teachers who had requested a hearing.²³¹ Teachers who did not request a hearing were deemed to have acquiesced and were placed on unrequested leave of absence.²³²

On appeal, the school board moved to dismiss certiorari because the teachers placed on leave failed to exercise their statutory remedy by not requesting a hearing.²³³ The court of appeals disagreed stating review was not precluded by failure to request a hearing because there is not a statutory right to appeal actual placement on unrequested leave of absence.²³⁴

The court then analyzed whether the school board's actions were arbitrary. The court of appeals held the school board's action was arbitrary because it was "based solely upon whether a teacher had requested a hearing,"²³⁵ which is not a listed ground for placement on leave under Minnesota Statutes section 125.12, subdivision 6b.²³⁶ The court stated:

Finally, if we affirm the School Board's decision, every teacher who is proposed to be placed on unrequested leave will feel compelled to request a hearing. The resulting burden upon school boards would run counter to the second policy embedded in Minnesota's teacher contract statutes allowing school boards the flexibility to deal with declining enrollments, financial limitations, and the other problems encountered in the administration of a school system.²³⁷

The Minnesota Supreme Court heard further arguments in

230. *Id.* at 513.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 514. The school board argued certiorari is proper only when there exists no other available remedy. It claimed the teachers' available remedy was to request a hearing. *Id.* at 513. The court of appeals emphasized the distinction between proposed and actual placement on unrequested leave of absence. *Id.* at 514 (quoting *Atwood v. Independent School Dist. No. 51*, 354 N.W.2d 9, 13 (Minn. 1984)). The court stated that, while appeal is made statutorily from proposed placement, the statute does not provide appeal from final placement. *See id.*

235. *Id.* at 515. "In essence, the board perceived that those who had not requested a hearing were vulnerable and placed them on unrequested leave." *Id.*

236. A teacher may be placed on unrequested leave of absence "because of discontinuance of position, lack of pupils, financial limitations, or merger of classes caused by consolidation of districts." MINN. STAT. § 125.12, subd. 6b.

237. *Roseville Educ. Ass'n*, 380 N.W.2d at 515.

*Roseville Education Association*²³⁸ and determined what school board action a teacher acquiesces in when the teacher does not request a hearing. It held a teacher acquiesces in two matters. First, the teacher concedes the school board has sufficient grounds to eliminate certain positions. Second, the teacher concedes he lacks seniority to bump a retained teacher.²³⁹

An important caveat emphasized by the supreme court is that acquiescence is based upon no change of circumstances. If a teacher's seniority and bumping rights are affected after expiration of the period to request a hearing, the teacher is entitled to school district review of newly arisen claims.²⁴⁰

The supreme court suggested the legislature expand the scope of the notice of placement on proposed unrequested leave. The court proposed that notice reflect "the school board's understanding of the teacher's seniority status."²⁴¹ This notice would alert a teacher of bumping ability and provide guidance to measure change in circumstances.

In *Grinolds v. Independent School District No. 597*,²⁴² the supreme court held that a school board's inherent managerial authority to terminate the superintendent did not permit the school board to terminate the superintendent without a hearing. *Grinolds* involved a conflict between Minnesota Statutes sections 123.34, subdivision 9 and 125.12. Section 123.34 provided that, despite section 125.12, subdivisions 6a or 6b, "no individual shall have a right to employment as a superintendent based on seniority or order of employment in any district."²⁴³

The school board contended this statute gave it the author-

238. 391 N.W.2d 846 (Minn. 1986). The supreme court held certiorari was the proper remedy because no adequate form of judicial review was provided by the statute. See *id.* at 849. Eight teachers' claims were dismissed by the supreme court because their petitions for certiorari were not filed within sixty days after receiving notice of their placement on unrequested leave. *Id.*; see *In re Pinkney*, 353 N.W.2d 676, 677-78 (Minn. Ct. App. 1984).

239. *Roseville Educ. Ass'n*, 391 N.W.2d at 850.

240. See *id.* at 852. A teacher properly placed on unrequested leave may seek reinstatement to a revived position pursuant to section 125.12, subdivision 6b(e) of Minnesota Statutes. See *id.* at 851 n.7.

241. *Id.* at 852.

242. 346 N.W.2d 123 (Minn. 1984). Grinolds was employed as a school superintendent and an elementary principal. Those positions were eliminated and Grinolds was reassigned to a full-time teaching position at reduced salary and benefits. The district hired a half-time supervisor. *Id.* at 125.

243. MINN. STAT. § 123.34, subd. 9 (1982).

ity to terminate its superintendent without a hearing.²⁴⁴ The court rejected this argument stating that "Section 123.34 does not remove a superintendent's position from the continuing contract laws. When a school board terminates a superintendent's contract it must comply with section 125.12."²⁴⁵ Teachers employed in nonteaching positions where the school board has the discretion to hire whomever they wish continue to be protected and are afforded a due process hearing.

One of the most significant procedural developments in Minnesota education law is the absolute requirement of the hiring of an independent hearing examiner in teacher termination matters.²⁴⁶ In *Schmidt v. Independent School District No. 1*,²⁴⁷ the Minnesota Court of Appeals formalized the requirement of a hearing examiner. Before *Schmidt*, the Minnesota Supreme Court had strongly recommended that school boards employ independent hearing examiners in all cases.²⁴⁸ The *Schmidt*

244. *Grinolds*, 346 N.W.2d at 126.

245. *Id.* at 127. The supreme court relied on the legislative history of section 123.34, subdivision 9 in concluding its reference to section 125.12 concerned only hiring and seniority, not removal. Because school boards must work closely with the district superintendent, it would be inconvenient to allow more senior and less affable teachers to bump a favored superintendent from his position. *See id.* It is to that limited extent section 123.34, subdivision 9 was legislated. *Id.*

246. By comparison, an independent hearing examiner is not required in school closing cases. *Bena*, 381 N.W.2d at 521. While both teacher termination and school closing hearings are quasi-judicial actions, "the line between judicial, legislative and administrative action is less clear in school closing cases . . ." *Id.* at 520. Other facts in addition to the public hearing determine school closings and the opportunity in termination cases for arbitrary action against an individual does not exist. As a result, the court of appeals declined "to impose a due process requirement that a hearing officer must conduct school closing cases." *Id.* at 521.

247. 349 N.W.2d 563 (Minn. Ct. App. 1984). Presiding at the hearing was chairman of the school board who had previously voted to place the teacher on unrequested leave of absence. *Id.* at 565. The court of appeals remanded for hiring of an independent hearing examiner. *Id.* at 568-69.

248. *See, e.g., Ganyo v. Independent School Dist. No. 832*, 311 N.W.2d 497 (Minn. 1981). The *Ganyo* court stated:

We have questioned the fairness of termination proceedings under our current statute, which permits local school boards to exercise the three-part role of prosecutor, judge and jury. *Kroll v. Independent School Dist. No. 593*, 304 N.W.2d 338, 345 (Minn. 1980); *Liffrig v. Independent School Dist. No. 442*, 292 N.W.2d 726, 730 (Minn. 1980). In *Kroll*, decided after the hearing in petitioner's case was conducted, we emphasized that, absent unusual or extenuating circumstances, a hearing examiner should be hired in all cases. 304 N.W.2d at 345 n.3. We suggest that the hearing examiner not be limited to taking evidence but, by analogy to the Administrative Procedure Act, Minn. Stat. § 15.052, subd. 3 (1980), also make detailed findings and conclusions which would then be available to the school board in reaching its decision on termination. We might add that our review of the record dis-

court adopted this requirement and refused to permit school boards to exercise the three-part role of prosecutor, judge and jury.²⁴⁹ The school board contended that an unrequested leave of absence hearing did not warrant the hiring of an independent hearing examiner.²⁵⁰ The court rejected this argument finding no exceptional circumstances to explain the board's failure to hire a hearing examiner.²⁵¹ The court went on to list those persons it believed were qualified to act as independent hearing examiners in teacher termination matters. These persons include retired judges, state hearing examiners, and arbitrators.²⁵²

In *Bates v. Independent School District No. 482*,²⁵³ the court of appeals clarified that a hearing examiner is not unqualified merely because he was not among those listed in *Schmidt*. The *Bates* hearing examiner was a lawyer.²⁵⁴ The court of appeals stated the *Schmidt* list was not exclusive and explained, "A hearing examiner is not conclusively unqualified merely because he is not among those listed in *Schmidt*. An independent showing of bias or lack of qualification or neutrality is necessary."²⁵⁵

The *Bates* court further stated a hearing examiner's lack of experience is not a factor to be considered in determining qualification. "Were that so, existing hearing examiners would form an exclusive group and inexperienced and otherwise

closes that the school board here, even though under severe time restraints and presented with numerous evidentiary problems, conducted the hearing in a conscientious and fair manner.

Id. at 499 n.2, quoted in *Schmidt*, 349 N.W.2d at 567.

249. *Schmidt*, 349 N.W.2d at 568.

250. *Id.* at 567-68.

251. *Id.* at 568.

252. Among those qualified to serve as the hearing examiner are:

(1) Retired judges.

(2) A state hearing examiner hired pursuant to Minn. Stat. § 14.55 (Supp. 1983).

(3) An arbitrator qualified by the State Public Employment Relations Board pursuant to Minn. Stat. § 179.72 (Supp. 1983).

Id.

253. 379 N.W.2d 239 (Minn. Ct. App. 1986).

254. *Id.* at 240.

255. *Id.* at 241. Compare *In re Termination of Hahn*, 386 N.W.2d 789, 792 (Minn. Ct. App. 1986) (no inference of bias is raised because the school board's attorney has appeared before the hearing officer in previous cases) with *Pinkney*, 366 N.W.2d at 365 (bias indicated when hearing examiner has a matter pending before the involved school district's attorney who was acting as a hearing examiner in an unrelated matter).

qualified persons would be excluded.”²⁵⁶

The court of appeals in *In re Termination of the Coaching Contract of Hahn*²⁵⁷ held the due process rights of statutory notice and hearing requirements do not apply when a coach's contract is not renewed for a subsequent year. The teacher argued the decision not to renew constituted termination triggering the due process requirements of Minnesota Statutes section 125.121.²⁵⁸ The court concluded the statute was clear and did not apply.²⁵⁹

A school board's decision not to renew a coaching contract does not constitute termination under section 125.121 because that decision can be made for *any reason* based on substantial and competent evidence.²⁶⁰ The court of appeals also held a letter to the coach stating his contract would not be renewed was sufficient notice.²⁶¹

These recent cases indicate the court's desire to afford

256. *Bates*, 379 N.W.2d at 241.

257. 386 N.W.2d 789 (Minn. Ct. App. 1986). Hahn was employed as head girls' basketball coach based on a series of one-year contracts. In May, he was given notice of the board's vote to not renew his contract for the following year. The school district gave Hahn a hearing although it did not believe he was entitled to one. *Id.*

258. *Id.* at 790.

259. The 1984 version of Minnesota Statutes section 125.121, subdivision 1 provides:

Before a district *terminates* the coaching duties of an employee who is required to hold a license as an athletic coach from the state board of education, the district shall notify the employee in writing and state its reason for the proposed termination. Within 14 days of receiving this notification, the employee may request in writing a hearing on the termination before the board. If a hearing is requested, the board shall hold a hearing within 25 days according to the hearing procedures specified in section 125.12, subdivision 9, and the termination shall not be final except upon the order of the board after the hearing.

MINN. STAT. § 125.121, subd. 1 (emphasis added). The *Hahn* court concluded, “A board decision not to offer an employee coaching duties for a subsequent year does not constitute a termination.” *Hahn*, 386 N.W.2d at 791.

260. *Hahn*, 386 N.W.2d at 791. Section 125.121 provides:

Subd. 2. Within ten days after the hearing, the board shall issue a written decision regarding the termination. If the board decides to terminate the employee's coaching duties, the decision shall state the reason on which it is based and include findings of fact based upon competent evidence in the record. The board may terminate the employee's duties or not, as it sees fit, for *any reason* which is found to be true based on substantial and competent evidence in the record.

MINN. STAT. § 125.121, subd. 2 (emphasis added). The *Hahn* court stated section 125.121 does not include the due process requirements of Minn. Stat. §§ 125.12 and 125.17 which permit discharge only based on specific grounds. Coaches are not included under sections 125.12 or 125.17.

261. *Hahn*, 386 N.W.2d at 790-91.

teachers strong due process protection. In most cases, notions of due process have been expanded to protect teachers' rights. Only where it is clear the teachers were not prejudiced by a school board's actions have the courts rejected teachers' due process claims. The danger of arbitrary termination of a teacher's livelihood demands, however, that strong due process rights continue to be enforced.

B. Grounds for Unrequested Leave of Absence and Dismissal

The statutory grounds for the placement of a continuing contract teacher on unrequested leave of absence are contained in Minnesota Statutes section 125.12, subdivisions 6a and 6b. A teacher may be placed on unrequested leave of absence "because of discontinuance of position, lack of pupils, financial limitations, or merger of classes caused by consolidation of districts."²⁶²

This language was interpreted by the Minnesota Supreme Court in *Laird v. Independent School District No. 317*.²⁶³ In *Laird*, the teacher who was placed on unrequested leave of absence claimed the statutory grounds were not met because a decline in enrollment had occurred gradually over a number of years and not in the immediately preceding school year. The supreme court rejected this argument holding "[t]he drop in enrollment need not occur in a single school year . . . to justify placing a teacher on unrequested leave."²⁶⁴

The teacher in *Laird* also claimed the statutory language allowing the school district to place teachers on unrequested leave of absence "as may be necessary" required an absolute showing of necessity.²⁶⁵ The *Laird* court rejected this argument. Once the school board has shown that the statutory grounds for placing a teacher on unrequested leave of absence exists, the school board is afforded some discretion to deter-

262. MINN. STAT. § 125.12, subds. 6(a) (negotiated unrequested leave of absence between the school board and the teachers' exclusive bargaining representative), and 6(b) (unrequested leave of absence ordered by school board). A single statutory ground is sufficient to support placement on unrequested leave of absence. *Bates*, 379 N.W.2d at 242.

263. 346 N.W.2d 153 (Minn. 1984).

264. *Id.* at 156. The supreme court concluded that whether enrollment declines occur in one year or gradually over several years does not alter the specific reason for reducing the number of teachers employed by the district. *Id.*

265. *Id.* at 155.

mine the number of teachers to be placed on unrequested leave of absence.²⁶⁶

Minnesota courts have also had several opportunities to discuss what constitutes sufficient grounds for terminating teachers. Two statutory termination procedures exist for dismissing teachers under Minnesota Statutes section 125.12.²⁶⁷ The difference in the procedures turns upon the remediability of the misconduct.²⁶⁸

Section 125.12, subdivision 6 presumes remediability. Under that procedure, the teacher is "given written notice of the specific items of complaint and reasonable time within which to remedy them."²⁶⁹ If the deficiencies are not corrected, the teacher may be terminated at the end of the school year. Appropriate grounds for applying this procedure are set forth in subdivision 6.²⁷⁰

Section 125.12, subdivision 8 provides grounds for immediate discharge. These grounds involve more serious misconduct and presume irremediability. This misconduct includes immoral conduct, conduct unbecoming a teacher, and willful neglect of duty.²⁷¹

In 1985, the Minnesota Court of Appeals reviewed the application of the two procedures in two cases. In *Russell v. Special*

266. *Id.* at 156. The supreme court stated that a school board's flexibility in effectively administering the operation of public schools is not eliminated by the unrequested leave of absence statute. *See id.* at 155.

267. *See* MINN. STAT. § 125.12, subds. 6, 8.

268. *Id.*

269. *Id.* § 125.12, subd. 6.

270. Subd. 6. Grounds for termination. A continuing contract may be terminated, effective at the close of the school year, upon any of the following grounds:

- (a) Inefficiency;
- (b) Neglect of duty, or persistent violation of school laws, rules, regulations, or directives;
- (c) Conduct unbecoming a teacher which materially impairs his educational effectiveness;
- (d) Other good and sufficient grounds rendering the teacher unfit to perform his duties.

A contract shall not be terminated upon one of the grounds specified in clauses (a), (b), (c), or (d), unless the teacher shall have failed to correct the deficiency after being given written notice of the specific items of complaint and reasonable time within which to remedy them.

Id.

271. Subdivision 8 states:

School District No. 6,²⁷² a physical education teacher was dismissed under subdivision 8 for physically abusing students. Russell had originally received a deficiency notice pursuant to subdivision 6.²⁷³ The letter listed nine deficiencies and directed Russell to avoid all corporal punishment.²⁷⁴ Subsequent continued misconduct resulted in his immediate termination.²⁷⁵

Russell argued the school district waived its right to terminate him pursuant to subdivision 8 after it served him with subdivision 6 notice.²⁷⁶ The court of appeals held the school district was not precluded from immediately terminating Russell.²⁷⁷ Which termination procedure applies will be determined by the remediability of that conduct.²⁷⁸ At first, Russell's conduct appeared correctable, but his subsequent conduct of striking a student, shoving him against a wall, grabbing his throat, and grinding his fist in the student's face was so outrageous as to be irremediable.²⁷⁹

Immediate discharge. A school board may discharge a continuing-contract teacher, effective immediately, upon any of the following grounds:

- (a) Immoral conduct, insubordination, or conviction of a felony;
- (b) Conduct unbecoming a teacher which requires the immediate removal of the teacher from his classroom or other duties;
- (c) Failure without justifiable cause to teach without first securing the written release of the school board;
- (d) Gross inefficiency which the teacher has failed to correct after reasonable written notice;
- (e) Willful neglect of duty; or
- (f) Continuing physical or mental disability subsequent to a twelve months leave of absence and inability to qualify for reinstatement in accordance with subdivision 7.

Prior to discharging a teacher the board shall notify the teacher in writing and state its ground for the proposed discharge in reasonable detail. Within ten days after receipt of this notification the teacher may make a written request for a hearing before the board and it shall be granted before final action is taken. The board may, however, suspend a teacher with pay pending the conclusion of such hearing and determination of the issues raised therein after charges have been filed which constitute grounds for discharge.

Id. § 125.12, subd. 8.

272. 366 N.W.2d 700 (Minn. Ct. App. 1985).

273. *Id.* at 704.

274. *Id.*

275. *See id.* at 702. Russell's deficiency notice resulted from his "confrontive style of discipline" and striking of students. *Id.*

276. *Id.* at 704-05.

277. *Id.* at 705.

278. *Id.* When prior rude behavior is not documented by written warning, remediability is a possibility and immediate dismissal is not justified. *See Beranek v. Joint Indep. School Dist. No. 287*, No. C2-86-790 (Minn. Ct. App. Oct. 28, 1986).

279. *Russell*, 366 N.W.2d at 705. The court of appeals stated a factor in determin-

Russell claimed his previous conduct was irrelevant in determining whether his subsequent conduct qualified as a subdivision 8 offense.²⁸⁰ The court of appeals disagreed and quoted *Kroll v. Independent School District No. 593*,²⁸¹ where the supreme court stated the "prior record of a teacher in disciplinary proceedings must always be considered under either termination procedure."²⁸² Thus, past conduct is relevant in determining a teacher's remediability.

In *Downie v. Independent School District No. 141*,²⁸³ the teacher served for four years as a full-time junior high school guidance counselor. During that period, Downie was never reprimanded or notified of any deficiencies.²⁸⁴ He was subsequently terminated under subdivision 8 for being involved in a weight-loss bet with two ninth grade females which included terms involving sexual favors.²⁸⁵ Downie also breached the confidentiality of counseled students and was generally sexually crude when speaking to students.²⁸⁶

Downie claimed the school district improperly applied sub-

ing remediability is whether the teacher's conduct has caused actual or threatened harm. *Id.* (quoting *Kroll v. Independent School Dist. No. 593*, 304 N.W.2d 338, 346 (Minn. 1981)). Here, Russell's notice of immediate termination stated the following as grounds:

Insubordination, conduct unbecoming a teacher which requires your immediate removal from your duties and from the classroom, gross inefficiency which you have failed to correct after reasonable written notice, and willful neglect of duty, consisting of the following:

1. Striking or hitting a student.
2. Pushing or pulling a student by the hair.
3. Pushing or pulling a student by the arms.
4. Pushing, shoving or throwing a student against a bench, wall or locker.
5. Grabbing or holding a student by the throat.
6. Grinding or shoving your hand or fist into the face or chin of a student.
7. Failure to follow an assertive discipline plan properly
8. Failure to avoid using physical force
9. Failure to avoid using corporal punishment
10. Failure to exercise proper or adequate self-control
11. Failure to develop proper relationships with students

Id. at 704.

280. *Id.* at 703. Russell argued past conduct is irrelevant because committing a subdivision 8 offense is sufficient on its own to warrant termination. *Id.* at 704.

281. 304 N.W.2d 338 (Minn. 1981). The supreme court concluded the school board's decision to dismiss under subdivision 8 was arbitrary and unreasonable given a single act of misconduct in 23 years of teaching. *See id.* at 346.

282. *Id.* at 345, quoted in *Russell*, 366 N.W.2d at 704.

283. 367 N.W.2d 913 (Minn. Ct. App. 1985), *petition for rev. denied* (Minn. July 26, 1985).

284. *Id.* at 915.

285. *Id.*

286. *See id.*

division 8 instead of subdivision 6 given his previous lack of misconduct and lack of warning.²⁸⁷ Again, the court of appeals focused on remediability stating:

Several factors should be weighed when determining remediability: the prior record of the teacher; the severity of the conduct in light of the teacher's record; whether the conduct resulted in actual or threatened harm, either physical or psychological; and whether the conduct could have been corrected had the teacher been warned by superiors. Furthermore, school boards are not required to wait for harm to come to their students before discharging a teacher.²⁸⁸

The court concluded subdivision 8 was properly applied.²⁸⁹ Downie, as a counselor, did not need to be warned that breaching confidentiality was improper conduct.²⁹⁰ Given his relationship with counselees, Downie's use of his influential position to exploit impressionable students was outrageous and the psychological harm caused or threatened was evident.²⁹¹

In *Fisher v. Independent School District No. 622*,²⁹² the court of appeals held "[p]roof of a teacher's sexual acts with a student

287. *Id.* at 917. He also argued his conduct was not sufficiently egregious to warrant immediate termination. *Id.*

288. *Id.* (citing *Kroll*, 304 N.W.2d at 345-46).

289. *Id.* at 918.

290. *See id.*

291. *See Downie*, 367 N.W.2d at 917. The court of appeals stated:

Downie was a junior high school counselor who counseled students on a one-to-one basis. His was a very influential and sensitive position. Because of his role as counselor, students confided in Downie to a much greater extent than they would in a teacher of English or math. The potential for students to be greatly harmed or greatly aided by their relationship with Downie was substantial. His impact on the lives of impressionable young people of junior high school age was great. Arguably, he should be held to an even greater standard of care and sensitivity than teachers in other disciplines.

The most serious of the charges against Downie and certainly the conduct which has the most potential for causing long-lasting harm to students is that upon numerous occasions he breached the confidentiality of students who came to him for counseling. We find particularly offensive Downie's disclosure of an incest victim's confidences to teachers in a social setting who had no compelling professional need for such information. The school nurse's testimony supports that such a disclosure could have devastating psychological consequences for the victim should she ever discover that Downie made such a disclosure.

Id.

292. 357 N.W.2d 152 (Minn. Ct. App. 1984). *Fisher*, an elementary school principal, was terminated on charges he sexually molested a male student over a period of

is uniformly held to be sufficient grounds for dismissal.”²⁹³ The court of appeals upheld the teacher’s termination in *Fisher* although the acts complained of occurred twelve to sixteen years before the teacher’s dismissal. The teacher had complained the acts were too remote in time to afford him due process, but the court of appeals held “it may be considered doubtful whether such conduct could ever be too remote in time.”²⁹⁴

In *Ostlund v. Independent School District No. 47*,²⁹⁵ a principal was dismissed for failing to complete teacher evaluations. The principal had been warned in prior years to complete required teacher evaluation forms.²⁹⁶ After the principal failed to correct the situation, the school board gave him a written deficiency notice.²⁹⁷ The court of appeals held the school board had sufficient grounds to terminate the principal.²⁹⁸

*Marshall County Central Education Association v. Independent School District No. 441*²⁹⁹ contains an interesting analysis of the relationship between Minnesota’s statute relating to teacher probationary periods³⁰⁰ and the Minnesota Public Employees

four years. At the time of the discharge hearing, the involved student was 23 years old and the father of three of his own children. See *id.* at 153-54.

293. *Id.* at 155.

294. *Id.* at 156 (quoting *Johnson v. Independent School Dist. No. 294*, No. 12305, slip op. at 17 (Minn. Dist. Ct. Feb. 12, 1980)). The court of appeals noted that subdivision 8 of section 125.12 did not contain a limitations period. *Id.* at 155.

295. 354 N.W.2d 492 (Minn. Ct. App. 1984).

296. See *id.* at 493-94.

297. *Id.*

298. See *Ostlund*, 354 N.W.2d 492.

299. 363 N.W.2d 126 (Minn. Ct. App. 1985).

300. The first and second consecutive years of a teacher’s first teaching experience in Minnesota in a single school district shall be deemed to be a probationary period of employment, and after completion thereof, the probationary period in each school district in which he is thereafter employed shall be one year. A teacher who has complied with the then applicable probationary requirements in a school district prior to July 1, 1967, shall not be required to serve a new probationary period in the said district subsequent thereto. During the probationary period any annual contract with any teacher may or may not be renewed as the school board shall see fit; provided, however, that the school board shall give any such teacher whose contract it declines to renew for the following school year written notice to that effect before June 1. If the teacher requests reasons for any non renewal of a teaching contract, the school board shall give the teacher its reason in writing, including a statement that appropriate supervision was furnished describing the nature and the extent of such supervision furnished the teacher during his employment by the board, within ten days after receiving such request. The school board may, after a hearing held upon due notice, discharge a teacher during the probationary period for cause, effective immediately under section 123.35, subdivision 5.

Labor Relations Act.³⁰¹ In *Marshall County*, a teacher was hired for a one year contract to teach a one-half time art instructor's position.³⁰² She was not a continuing contract teacher.³⁰³ Sometime during the contract year, the teacher filed a grievance claiming she was being assigned more than a half-time teaching assignment.³⁰⁴ She claimed she was not allowed sufficient preparation time and that her salary was inadequate.³⁰⁵

When the school board was considering the teacher's employment for the following school year, the board adopted a resolution to terminate the teacher's contract at the end of the current school year for her "lack of cooperation."³⁰⁶ The teacher, however, had performed all the terms of her teaching contract. The principal of the school where the teacher was teaching commended her for teaching proficiency.³⁰⁷

The court of appeals was forced to determine if the school board's action was appropriate under seemingly conflicting statutes. Under the applicable teacher statute, a probationary teacher could be terminated by the school board at will.³⁰⁸ In the past, the courts had construed the teacher statute as vesting the board with "unlimited discretion"³⁰⁹ to renew a probationary teacher's contract.³¹⁰

Under the Minnesota Public Employment Labor Relations Act (PELRA),³¹¹ however, "a public employee may not be ter-

MINN. STAT. § 125.12, subd. 3.

301. MINN. STAT. §§ 179.61-.76 (1982 & Supp. 1983) (current version at MINN. STAT. § 179A.01-.23 (1984)).

302. *Marshall County*, 363 N.W.2d 127-28.

303. *Id.* at 127.

304. *Id.* at 128.

305. *Id.* at 127-28. Had the teacher's contract for the following school year been renewed, she would have acquired continuing contract rights. *Id.* The teacher's grievance was denied by the school principal based on a letter written by the superintendent which demonstrated that the teacher had been assigned duties just under half the required time commitment of full-time teaching duties. The grievance was then submitted to the superintendent as required, but was later withdrawn. *Id.*

306. *Id.*

307. *Id.*

308. See MINN. STAT. § 125.12, subd. 3 ("During the probationary period any annual contract with any teacher may or may not be renewed as the school board shall see fit.").

309. See, e.g., *Skeim v. Independent School Dist. No. 115*, 305 Minn. 464, 473, 234 N.W.2d 806, 812 (1975); *Pearson v. Independent School Dist. No. 716*, 290 Minn. 400, 402, 188 N.W.2d 776, 778 (1971).

310. See *Marshall County*, 363 N.W.2d at 129.

311. MINN. STAT. § 179A.01-.23 (1984) (current version). PELRA was designed to resolve disputes between public employers and their employees. Its provisions in-

minated for submitting a grievance.”³¹² The *Marshall County* court held the probationary teacher was a public employee and that the provisions of PELRA were controlling.³¹³ The court held the board’s claim of lack of cooperation “was a mere pretext to terminate [the teacher] for exercising her statutory right to assert a grievance under PELRA.”³¹⁴ Consequently, the court held the provisions of Minnesota Statutes section 125.12, subdivision 3 were not applicable and that PELRA limits a school board’s discretionary power to terminate probationary teachers.³¹⁵

Recent developments in this area indicate school boards have considerable discretion in placing teachers on unrequested leave or terminating their employment. While grounds must be clearly stated, cause for the school board’s action need not occur within a single school year nor within immediate school years. Further, the court will uphold a school board’s decision to immediately discharge a teacher if the teacher’s wrongful conduct is demonstrated as irremediable. Recent cases demonstrate school boards have an obligation to protect their pupils from teacher misconduct and that school boards have a right to act in the district’s financial best interests.

C. Seniority and Bumping Rights

1. General Principles

One of the most litigated areas in school law has been the seniority rights of teachers placed on unrequested leave of absence. Generally, the rule is that teachers must be placed on unrequested leave of absence “in the inverse order in which they were employed by the school district.”³¹⁶ Seniority rights

clude unfair labor practices, negotiation procedures, mediation, arbitration, and various employer and employee rights and obligations.

312. *Marshall County*, 363 N.W.2d at 129 (citing *Ekstedt v. Village of New Hope*, 292 Minn. 152, 193 N.W.2d 821 (1972) where the supreme court interpreted the predecessor to MINN. STAT. § 179.65, subd. 1 (1982) found at MINN. STAT. § 179.52 (1969)).

313. *Marshall County*, 363 N.W.2d at 130.

314. *Id.*

315. *See id.*

316. The applicable Minnesota Statute provides:

Teachers who have acquired continuing contract rights shall be placed on unrequested leave of absence in fields in which they are licensed in the inverse order in which they were employed by the school district. In the

are violated if a teacher is placed on unrequested leave and a qualified licensed teacher with less seniority is retained.³¹⁷

The most straightforward application of this principle is contained in *Pearson v. School Board of Independent School District No. 381*.³¹⁸ *Pearson* involved a teacher who met with the disfavor of the school board.³¹⁹ After several unsuccessful attempts to terminate the teacher's employment, the school board placed the teacher on unrequested leave of absence in 1981.³²⁰ At the same meeting where the school board terminated *Pearson*, however, the board voted to hire a new full-time math teacher and a new part-time special education director.³²¹ These were positions the laid off teacher was licensed and qualified to teach.³²²

Applying Minnesota Statutes section 125.12, subdivision 6b, the Minnesota Court of Appeals held, "Pearson should have been offered another position for which he was qualified. Any 'teacher' under section 125.12(1) qualified for a position with greater seniority than another 'teacher' in the position may take the less senior teacher's position."³²³

In *Berger v. Independent School District No. 706*,³²⁴ the court of appeals held teachers do not forfeit seniority when granted extended leaves of absence pursuant to the Minnesota teacher mobility statute, Minnesota Statutes section 125.60.³²⁵ The

case of equal seniority, the order in which teachers who have acquired continuing contract rights shall be placed on unrequested leave of absence in fields in which they are licensed shall be negotiable.

MINN. STAT. § 125.12, subd. 6b(b).

317. See *Bye v. Special Intermediate School Dist. No. 916*, 379 N.W.2d 653, 659-60 (Minn. Ct. App. 1986), *petition for rev. denied* (Minn. Mar. 14, 1986).

318. 356 N.W.2d 438 (Minn. Ct. App. 1984).

319. *Id.* at 440.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* at 441 (quoting *Roseville Educ. Ass'n v. Independent School Dist. No. 623*, 353 N.W.2d 691, 694 (Minn. Ct. App. 1984)).

324. 362 N.W.2d 369 (Minn. Ct. App. 1985). In 1978, Robert Chopp was granted a five-year leave of absence pursuant to section 125.60 of Minnesota Statutes. In 1982, Chopp spoke with the district superintendent about extending his leave. The school board eventually approved the extended leave until January 1983 without loss of seniority. Dennis Berger, a teacher less senior to Chopp by one year, filed a grievance claiming Chopp should have lost seniority to the extent of his extended leave. See *id.* at 370-71.

325. *Id.* at 373. Preserving seniority fulfills the purpose of section 125.60 to allow and encourage teachers to pursue additional education and professional expansion. See *id.* see also *Urdahl v. Independent School Dist. No. 181*, No. C7-86-1045 (Minn.

court noted, however, that the statute limits extended leaves to five years. When a teacher is granted an additional year of general leave, his seniority is forfeited.³²⁶ General leaves are not subject to the teacher mobility statute.³²⁷

*Vettleson v. Special School District No. 1*³²⁸ held a school district may be sued for misrepresentation for using an inaccurate seniority list when proposing to place teachers on unrequested leave of absence. In *Vettleson*, the school district proposed a layoff for a school counselor.³²⁹ The counselor requested a hearing and, at the hearing, was granted a one-year leave of absence to take employment in another district at lower pay.³³⁰ Subsequently, the counselor became aware that the school district had retained a more senior counselor who had been unlicensed for two years.³³¹ The laid off counselor then brought an action against the school district for misrepresentation.³³²

The court of appeals held the teacher had a valid claim. It held the school district engaged in misrepresentation by posting an inaccurate seniority list for guidance counselors which included the unlicensed counselor. Since the laid off counselor relied on this list and took another job with less pay, the misrepresentation claim was actionable. Although the school district claimed it was not aware that the unlicensed teacher was working with an expired license, the court held good faith is not a defense to a claim of misrepresentation.³³³

*Roseville Education Association v. Independent School District No. 623*³³⁴ analyzed how a teacher's seniority rights affect the teacher's right to bump into administrative positions. In *Roseville*, the district employed six persons as deans.³³⁵ The dean

Ct. App. Nov. 18, 1986) (a negotiated plan cannot modify the provisions of section 125.60 to deny seniority credit to teachers on extended leave of absence).

326. *Berger*, 362 N.W.2d at 374.

327. *See id.* (citing MINN. STAT. § 125.60, subd. 4).

328. 361 N.W.2d 425 (Minn. Ct. App. 1985).

329. *Id.* at 427.

330. *Id.*

331. *Id.*

332. *See id.* "Vettleson, as the most senior counselor laid off, would have been retained had the license expiration been discovered." *Id.*

333. *See id.* at 428. The court of appeals held that the school district "had a duty to investigate the licensure status of its senior teachers." *Id.* The court stated that such a duty is "strongly implied by statute." *Id.* (citing MINN. STAT. §§ 125.11, 125.12, subds. 4, 6b(b)).

334. 353 N.W.2d 691 (Minn. Ct. App. 1984).

335. *Id.* at 692.

position was an administrative supervisory position.³³⁶ The district, however, required all persons employed as deans to hold teaching licenses.³³⁷

The school district proposed to place two teachers on leaves of absence who had greater seniority than one of the deans.³³⁸ The teachers claimed they should have been assigned a dean's position because their seniority was greater than that of the dean.³³⁹ The court of appeals adopted this position stating, "The statute is unambiguous. Its plain meaning is that all 'teachers' within the statutory definition of the term are subject to the seniority claims of other teachers. No distinction is made between administrative and teaching positions."³⁴⁰ Thus, the *Roseville* court allowed the teachers to bump into the deans' positions.³⁴¹

In *Renstrom v. Independent School District No. 261*,³⁴² a teacher in the Ashby school district was placed on unrequested leave. Pursuant to a joint powers agreement under Minnesota Statutes section 471.69, subdivision 1, students wishing to take courses previously taught by Renstrom were sent to the Evansville school district for instruction by a less senior teacher. Renstrom claimed she was entitled to reinstatement pursuant to Minnesota Statutes section 122.541.³⁴³

Minnesota Statutes section 122.541 provides that:

The boards of two or more school districts may, after consultation with the department of education, enter into an agreement providing for the discontinuance by a district of any of grades kindergarten through 12 or portions of those grades and the instruction in a cooperating district of the pupils in the *discontinued grades or portions of grades . . .*³⁴⁴

Under this section, senior teachers may retain their employment to "teach in a cooperating district as exchange teachers

336. *See id.* at 692-93.

337. *Id.* at 693.

338. *Id.* at 692.

339. *See id.* at 692-93.

340. *Id.* at 693 (citing Op. Att'y Gen. 172-d (1975), *found in* 8 Minn. Legal Reg. 52, 56 (1975)).

341. *See id.* at 694. *Cf. Evans v. Independent School Dist. No. 281*, No. C4-86-1181 (Minn. Ct. App. Nov. 25, 1981) (administrators without district classroom teaching experience may bump less senior classroom teachers).

342. 390 N.W.2d 25 (Minn. Ct. App. 1986).

343. *See id.* at 27.

344. MINN. STAT. § 122.541, subd. 1 (1984) (emphasis added).

. . . .”³⁴⁵

The court of appeals reluctantly rejected Renstrom’s claim that section 122.541 applied to her case. Review of the legislative history showed “portion of grades” was meant to consist of more than a few courses. The court stated:

Under these circumstances, we are constrained to read section 122.541 to apply only to instances where grades or portions of grades are discontinued and those students affected receive all their instruction in another school district. Section 122.541 does not apply where students are transported to another school district to take one or two classes that have been discontinued in their district but continue to receive the remainder of their education in the school district where they reside.³⁴⁶

While *Renstrom* may provide a sympathetic case, the court of appeals properly ascertained legislative intent and correctly did not apply section 122.541.

2. *Realignment of Assignments*—Dreyer, Strand, and Brandhorst

In *State ex rel. Dreyer v. Board of Education of Independent School District No. 542*,³⁴⁷ the supreme court discussed the efforts a school board should make to realign positions when partially eliminating a position. *Dreyer* involved a principal whose position was reduced from a full-time position to a half-time position.³⁴⁸ At the same time, a full-time teaching position became available in the district.³⁴⁹ The school district offered the principal his choice of either the half-time principal position or the full-time teaching position.³⁵⁰ The principal’s request that he be given a position consisting of a half-time principal assignment and a half-time teaching assignment was rejected by the school district.³⁵¹

The supreme court remanded the matter holding it would have been appropriate for the hearing examiner to take evidence and make findings regarding the parties’ proposals for

345. *Id.* subd. 5.

346. *Renstrom*, 390 N.W.2d at 28.

347. 344 N.W.2d 411 (Minn. 1984).

348. *Id.* at 412.

349. *Id.*

350. *Id.*

351. *Id.* Dreyer did accept the full-time teaching position subject to his rights in this appeal. *Id.* at 413.

reassignment. Since the hearing examiner had not considered the issue, the supreme court found it impossible to determine whether the school district was arbitrary and unreasonable by failing to make the principal's proposed reassignment.³⁵²

One of the most significant recent education law cases is *Strand v. Special School District No. 1*.³⁵³ *Strand* involved an appeal by several teachers placed on unrequested leave of absence. Strand was a tenured teacher employed by the district since 1972.³⁵⁴ Her position was terminated in 1984 because of discontinuance of position and lack of pupils.³⁵⁵ She contended that a more senior teacher should have been reassigned in the district to protect her seniority rights.³⁵⁶ If the more senior teacher would have been reassigned, Strand could have filled that teacher's position and a less senior teacher would have been terminated.³⁵⁷ Thus, the issue was whether the applicable provisions of the Teacher Tenure Act required the reassignment of a more senior teacher to accommodate the seniority position of a less senior teacher who was proposed for termination.³⁵⁸

The court first discussed the concept of position. A teacher less senior than Strand had been assigned a position consisting of .6 work experience and .4 child development. The school district contended this assignment constituted one position and that Strand could not teach the .4 child development assignment for which she was qualified and licensed.³⁵⁹ The

352. *Id.* at 413-14. Because Dreyer was not actually leaving the employ of the school district, the supreme court concluded the case did not involve bumping or realignment of teachers. *Id.* at 413. The parties argued the issue of whether section 125.12 requires realignment in the case of unrequested leave, but because of its conclusion, the court expressly stated the opinion had no precedential value as to that issue. *See id.* at 413 n.2.

353. 361 N.W.2d 69 (Minn. Ct. App. 1984), *aff'd in part and rev'd in part*, 392 N.W.2d 881 (Minn. 1986).

354. *Strand*, 361 N.W. 2d at 71.

355. *Id.*

356. *See id.* at 72.

357. *See id.*

358. *Id.* Strand was licensed to teach both home economics and child development. Senior to her was Jessie Busse who was licensed to teach home economics, work experience and child development. Less senior to Strand was Janell Olson who was licensed to teach work experience and child development. Strand claimed Busse should have been reassigned to fill the position ultimately given Olson, Strand should have assumed Busse's former position and Olson, the least senior, should have been placed on unrequested leave. *Id.* at 71.

359. *See id.*

court of appeals, quoting *Berland v. Special School District No. 1*,³⁶⁰ stated, “‘Position’ within the context of Minn. Stat. § 125.17 is that subject area and grade level for which the teacher is qualified as evidenced by licensure from the State of Minnesota.”³⁶¹

The court held Strand should have been assigned to the .4 child development position.³⁶² The court of appeals believed defining position as an area of state licensure best effectuated the purposes of the Teacher Tenure Act.

We believe the board’s definition of “position” as any particular grouping of different areas of licensure is too restrictive under *Berland*. This definition of position would permit the arbitrary combination of different areas of licensure into one “position” and circumvent teachers’ tenure rights.³⁶³

The court then addressed Strand’s realignment argument. Since Strand had demonstrated the possibility of shifting a more senior teacher to accommodate her seniority rights, the court agreed that realignment should have taken place. “When reducing teaching staffs, the school district is required, whenever possible, to retain its most senior teachers, by reasonable realignment if necessary.”³⁶⁴ Although the court recognized its holding placed a limitation on the management powers of the school district, the court believed a teacher’s seniority rights were more important under the circumstances.³⁶⁵

In *Strand*, another teacher, Barbara Johnson, claimed she was improperly terminated because the school district retained

360. 314 N.W.2d 809, 812 (Minn. 1981). *Berland* was a consolidation of three appeals each involving teacher termination under Minnesota Statutes section 125.17, subdivision 4(5). Each teacher claimed entitlement to the position based on seniority. *See id.* at 810. Regarding one of the teachers who was reinstated, the supreme court stated that the school district’s position that “bumping” was not allowed or mandated by the Teacher Tenure Act “would have the inevitable effect of discouraging teachers from ever pursuing specialized training or attaining multiple licensure.” *Id.* at 812.

361. *Strand*, 361 N.W.2d at 72-73.

362. *Id.* at 73.

363. *Id.* (citing *Hayes v. Board of Educ.*, 103 Ill. App. 3d 498, 502, 431 N.E.2d 690, 693 (1982)).

364. *Id.* (quoting *Proch v. New Castle Area School Dist.*, 60 Pa. Commw. 111, 112, 430 A.2d 1034, 1035 (1981)).

365. *Id.* (citing with approval *Welsko v. School Board*, 383 Pa. 390, 394, 119 A.2d 43, 45 (1956)). The danger in not intervening would be the likelihood that seniority status would be circumvented by reassignment. *See id.*

a more senior teacher who was past the mandatory age of retirement. Johnson claimed the school district's retention of a teacher past mandatory retirement age contravened several Minnesota statutes and the school district's own policy on compulsory retirement.³⁶⁶ The court of appeals held the board acted unreasonably, arbitrarily and under an erroneous theory of law by terminating Johnson while retaining the more senior teacher who had passed the mandatory retirement age.³⁶⁷

The Minnesota Supreme Court's subsequent decision in *Strand*³⁶⁸ affirmed the court of appeals' reinstatement of Strand but reversed the intermediate court's reinstatement of Johnson. The opinion provides definite guidance regarding both issues.

In concluding that Johnson was not entitled to bump a 72-year-old teacher, the supreme court rejected the court of appeals' statutory interpretation. The intermediate court relied on the school district's written policy which stated, "Any teacher who has attained the age of 70 as of June 30 of any year shall be automatically retired and removed from the services of the school system."³⁶⁹ The court of appeals also concluded Johnson should have been reinstated because Minnesota Statutes sections 181.81, subdivision 1(b)³⁷⁰ and 354A.21³⁷¹ supported termination of the older, but more senior, teacher.³⁷²

The supreme court found nothing in section 181.81 precluding waiver of compulsory retirement by the school district and the teacher. It also stated that even if the written policy was incorporated as part of the older teacher's employment contract, Johnson did not have standing to enforce that term.³⁷³ The court additionally concluded the older teacher was not a

366. *Id.* at 74. Minnesota Statutes section 354A.21 requires termination when a teacher reaches age 70 years. *See id.*; *see also* MINN. STAT. §§ 181.81, subd. 1, 354A.011, subds. 1, 27 and 354A.05 (1984).

367. *Strand*, 361 N.W.2d at 75.

368. 392 N.W.2d 881 (Minn. 1986), *aff'g in part and rev'g in part*, 361 N.W.2d 69 (Minn. Ct. App. 1984).

369. *Strand*, 361 N.W.2d at 74.

370. "Employment shall continue . . . until the employee reaches the compulsory retirement age established by the employer." MINN. STAT. § 181.81, subd. 1(b).

371. "[A] teacher subject to the provisions of this chapter shall terminate employment at the end of the academic year in which the teacher reaches the age of 70." *Id.* § 354A.21 (1984).

372. *Strand*, 361 N.W.2d at 74.

373. The court stated that Johnson was not a third-party beneficiary of the older

“teacher” as defined by section 354A.011³⁷⁴ and, therefore, was not subject to the provisions of chapter 354A.³⁷⁵

Most significantly, the supreme court emphasized that attainment of a specified age is not a statutory ground for discharge under the Teacher Tenure Act.³⁷⁶ While school boards not in cities of the first class may require its continuing contract teachers to retire at age 70, no similar statutory provision exists regarding tenured teachers.³⁷⁷ Reacting to this difference, the supreme court stated that given “this apparently deliberate omission of authority to provide by rule for compulsory retirement, we regard the school district’s policy of mandatory retirement at age 70 as unenforceable under the Teacher Tenure Act.”³⁷⁸ School districts in cities of the first class negotiating with tenured teachers should also note the supreme court’s directive that compulsory retirement is *not* a

teacher’s employment contract. *Strand*, 392 N.W.2d at 886 (citing *Cretex Co. v. Construction Leaders, Inc.*, 342 N.W.2d 135 (Minn. 1984)).

374. “Teacher” means any person who renders service in a public school district located in the corporate limits of one of the cities of the first class which was so classified on January 1, 1979 as any of the following:

(a) a full time employee in a position for which a valid license from the state board of education is required;

(b) an employee of the teachers retirement fund association located in the city of the first class unless the employee has exercised the option pursuant to Laws 1955, Chapter 10, Section 1, to retain membership in the Minneapolis employees retirement fund established pursuant to chapter 422A;

(c) a part time employee in a position for which a valid license from the state board of education is required who also renders other non-teaching services for the school district unless the board of trustees of the teacher retirement fund association determines that the combined employment is on the whole so substantially dissimilar to teaching service that the service shall not be covered by the association.

MINN. STAT. § 354A.011, subd. 27. The supreme court found none of the qualifications applied to the involved teacher. See *Strand*, 392 N.W.2d at 887.

375. See *Strand*, 392 N.W.2d at 887.

376. Causes for the discharge or demotion of a teacher either during or after the probationary period shall be:

(1) Immoral character, conduct unbecoming a teacher, or insubordination;

(2) Failure without justifiable cause to teach without first securing the written release of the school board having the care, management, or control of the school in which the teacher is employed;

(3) Inefficiency in teaching or in the management of a school;

(4) Affliction with active tuberculosis or other communicable disease shall be considered as cause for removal or suspension while the teacher is suffering from such disability; or

(5) Discontinuance of position or lack of pupils.

MINN. STAT. § 125.17, subd. 4.

377. “Notwithstanding the foregoing provisions, a board may provide by rule that its teachers shall be retired at age 70.” *Id.* § 125.12, subd. 5.

378. *Strand*, 392 N.W.2d at 887.

term which may be incorporated into a collective bargaining agreement.³⁷⁹

Regarding Strand, the supreme court began its analysis by stating that "[f]undamental to the disposition of Strand's claim is the development of a practical definition of the term 'position' for purposes of the Teacher Tenure Act."³⁸⁰ The court noted, however, that "it is impossible to articulate a precise definition,"³⁸¹ but explained that "[t]he difficulty in articulating a precise definition reflects the fact that although the legislature has clearly adopted a policy strongly favoring the retention of senior teachers, it has also made it clear that public school districts must be accorded sufficient flexibility to effectively administer the schools."³⁸²

The supreme court's solution was to provide several factors which school boards must consider in implementing the court's ruling that "the Teacher Tenure Act mandates a reasonable realignment of course assignments for the protection of seniority rights"³⁸³ A school district must examine "the teacher's length of service, the duration and scope of the teacher's license, the school district's needs reflecting the welfare of the students and the public, and the ease of reassignment or realignment of course schedules"³⁸⁴ The supreme court also directed school districts to consider these factors in "developing anticipatory plans designed to distribute teaching assignments among the senior tenured teachers."³⁸⁵

In essence, school districts must now, when practical and reasonable, reassign or realign teaching duties to retain senior teachers. While each class hour assigned to a teacher is not a protectable "position," a multi-subject teaching assignment is not a "position."³⁸⁶ A multiple-licensed teacher is subject to reassignment to any licensed subject whether requested or not, but will, on the other hand, be more likely to retain

379. *Id.*

380. *Id.* at 884.

381. *Id.* at 885.

382. *Id.* (citing *Laird v. Independent School Dist. No. 317*, 346 N.W.2d 153, 155 (Minn. 1984)).

383. *Id.*

384. *Id.*

385. *Id.*

386. *See id.*

employment.³⁸⁷

In a companion case to *Strand*, the Minnesota Supreme Court clarified that the duration of a work assignment does not affect the substance of a teaching position. In *Brandhorst v. Special School District No. 1*,³⁸⁸ Manston, a teacher holding a thirty-eight-week position which was being discontinued, sought to bump into a forty-six-week position requiring the same licensure taught by a teacher with less seniority. The school district rejected Manston's claim concluding the reassignment would constitute a promotion not required by the Teacher Tenure Act.³⁸⁹

The supreme court affirmed the court of appeals and held that the two positions were essentially the same. Although one assignment was eight weeks longer and caused an increase in total wages, the reassignment was not a promotion.³⁹⁰

Seniority rights provide a basis for determining which teachers remain in available positions. Long years of service should be rewarded by job security. Seniority lists can be quite complex as demonstrated by *Strand*. Currently, a teacher's "position" may consist of varied work assignments. When reducing active staff, school boards must consider teachers' full qualifications and licensure.

D. Negotiated Plans vs. Statutory Rights

In 1974, the Minnesota Legislature adopted the statutory provisions for placing teachers on unrequested leave of absence.³⁹¹ Those provisions were intended to provide the school district more flexibility in dealing with declining enrollment while, at the same time, affording greater protection for teachers' seniority rights. Under Minnesota Statutes section 125.12, subdivision 6a, a school board and the teachers' bargaining representative may negotiate a plan providing for un-

387. See *id.* at 886. In *Strand*, Busse, the most senior teacher involved, would be reassigned as the work experience coordinator even though she had not requested to be assigned that position. The court concluded that change did not constitute displacement or bumping. *Id.* at 885-86.

388. 392 N.W.2d 888 (Minn. 1986), *aff'g* 365 N.W.2d 383 (Minn. Ct. App. 1985).

389. *Id.* at 889.

390. *Id.* at 889-90 (citing *Strand*, 392 N.W.2d 881 (Minn. 1986); *State ex rel. Haak v. Board of Educ.*, 367 N.W.2d 461, 467 (Minn. 1985)).

391. See 1974 Minn. Laws ch. 458, at 1127-29.

requested leave of absence.³⁹² If a plan is not negotiated, the provisions and procedures contained in section 125.12, subdivision 6b apply.³⁹³

Subdivision 6b contains detailed procedures for placing teachers on unrequested leave of absence.³⁹⁴ A conflict has

392. Minnesota Statutes section 125.12, subdivision 6a provides:

The school board and the exclusive bargaining representative of the teachers may negotiate a plan providing for unrequested leave of absence without pay or fringe benefits for as many teachers as may be necessary because of discontinuance of position, lack of pupils, financial limitations, or merger of classes caused by consolidation of districts. Failing to successfully negotiate such a plan, the provisions of subdivision 6b shall apply. The negotiated plan shall not include provisions which would result in the exercise of seniority by a teacher holding a provisional license, other than a vocational educational license, contrary to the provisions of subdivision 6b, clause (c), or the reinstatement of a teacher holding a provisional license, other than a vocational education license, contrary to the provisions of subdivision 6b, clause (e). The provisions of section 179A.16 shall not apply for the purposes of this subdivision.

MINN. STAT. § 125.12, subd. 6a.

393. *See id.*

394. Minnesota Statutes section 125.12, subdivision 6b provides:

The school board may place on unrequested leave of absence, without pay or fringe benefits, as many teachers as may be necessary because of discontinuance of position, lack of pupils, financial limitations, or merger of classes caused by consolidation of districts. The unrequested leave shall be effective at the close of the school year. In placing teachers on unrequested leave, the board shall be governed by the following provisions:

(a) The board may place probationary teachers on unrequested leave first in the inverse order of their employment. No teacher who has acquired continuing contract rights shall be placed on unrequested leave of absence while probationary teachers are retained in positions for which the teacher who has acquired continuing contract rights is licensed;

(b) Teachers who have acquired continuing contract rights shall be placed on unrequested leave of absence in fields in which they are licensed in the inverse order in which they were employed by the school district. In the case of equal seniority, the order in which teachers who have acquired continuing contract rights shall be placed on unrequested leave of absence in fields in which they are licensed shall be negotiable;

(c) Notwithstanding the provisions of clause (b), no teacher shall be entitled to exercise any seniority when that exercise results in that teacher being retained by the district in a field for which the teacher holds only a provisional license, as defined by the board of teaching, unless that exercise of seniority results in the placement on unrequested leave of absence of another teacher who also holds a provisional license in the same field. The provisions of this clause shall not apply to vocational education licenses;

(d) Notwithstanding clauses (a), (b) and (c), if the placing of a probationary teacher on unrequested leave before a teacher who has acquired continuing rights, the placing of a teacher who had acquired continuing contract rights on unrequested leave before another teacher who has acquired continuing contract rights but who has greater seniority, or the restriction imposed by the provisions of clause (c) would place the district in violation of its affirmative action program, the district may retain the probationary teacher, the teacher with less seniority, or the provisionally licensed teacher;

(e) Teachers placed on unrequested leave of absence shall be reinstated to the positions from which they have been given leaves of absence

arisen in several cases where a negotiated unrequested leave of absence plan has explicitly denied or not addressed statutory rights contained in Minnesota Statutes section 125.12.

Although several recent cases have dealt with this subject, a complete understanding of these recent developments would be difficult without an understanding of the 1978 case, *Jerviss v. Independent School District No. 294*.³⁹⁵ In *Jerviss*, an unrequested leave of absence plan negotiated under subdivision 6a allowed the school board to place teachers on an unrequested leave of absence without notice of proposed placement on unrequested leave of absence and without a hearing. The supreme court was asked to determine whether the teacher should have been afforded minimal due process rights.³⁹⁶

The *Jerviss* court presented a lengthy analysis of the history

or, if not available, to other available positions in the school district in fields in which they are licensed. Reinstatement shall be in the inverse order of placement on leave of absence. No teacher shall be reinstated to a position in a field in which the teacher holds only a provisional license, other than a vocational education license, while another teacher who holds a nonprovisional license in the same field remains on unrequested leave. The order of reinstatement of teachers who have equal seniority and who are placed on unrequested leave in the same school year shall be negotiable;

(f) No appointment of a new teacher shall be made while there is available, on unrequested leave, a teacher who is properly licensed to fill such vacancy, unless the teacher fails to advise the school board within 30 days of the date of notification that a position is available to that teacher, that he or she may return to employment and that he or she will assume the duties of the position to which appointed on a future date determined by the board;

(g) A teacher placed on unrequested leave of absence may engage in teaching or any other occupation during the period of this leave;

(h) The unrequested leave of absence shall not impair the continuing contract rights of a teacher or result in a loss of credit for previous years of service;

(i) The unrequested leave of absence of a teacher who is placed on unrequested leave of absence prior to January 1, 1978 and who is not reinstated shall continue for a period of two years after which the right to reinstatement shall terminate. The unrequested leave of absence of a teacher who is placed on unrequested leave of absence on or after January 1, 1978 and who is not reinstated shall continue for a period of five years, after which the right to reinstatement shall terminate; provided the teacher's right to reinstatement shall also terminate if he or she fails to file with the board by April 1 of any year a written statement requesting reinstatement;

(j) The same provisions applicable to terminations of probationary or continuing contracts in subdivisions 3 and 4 shall apply to placement on unrequested leave of absence;

(k) Nothing in this subdivision shall be construed to impair the rights of teachers placed on unrequested leave of absence to receive unemployment compensation if otherwise eligible.

MINN. STAT. § 125.12, subd. 6b (1984).

395. 273 N.W.2d 639 (Minn. 1978).

396. *Id.* at 640-41. The teacher brought a declaratory judgment action seeking reinstatement and back pay. On cross-motions for summary judgment, the trial court

of the adoption of subdivisions 6a and 6b. The court concluded that provision for an optional negotiated leave of absence plan did not permit the negotiating parties to eliminate pre-existing statutory rights. The *Jerviss* court stated:

Absent specific statutory authorization to omit procedures including notice and a hearing prior to placement on unrequested leave of absence, therefore, the parties may not adopt a plan that does not include such a procedure. Further, if the plan merely omits any reference to such a procedure, as is the case with the plan at issue here, the plan may be read to incorporate the statutory requirement of subdivision 4 by implication.³⁹⁷

The court ruled the teacher was entitled to notice of proposed placement on unrequested leave of absence and a hearing.³⁹⁸

In *Atwood v. Independent School District No. 51*,³⁹⁹ the Minnesota Supreme Court addressed another conflict between the provisions of subdivisions 6a and 6b. In *Atwood*, a negotiated plan provided that teachers could be placed on unrequested leave of absence without a hearing provided written notice was given by April 1 of the school year prior to the commencement of the leave of absence.⁴⁰⁰ Nevertheless, a teacher who received notice requested a hearing.⁴⁰¹ The hearing was held on May 17, 1982, and the teacher moved the hearing examiner to dismiss the proceedings because a final decision had not been rendered by April 1, as required under the bargaining agreement.⁴⁰² The hearing examiner rejected this objection and recommended that the teacher be placed on unrequested leave of absence.⁴⁰³ This recommendation was adopted by the school board, but the district court reversed.⁴⁰⁴ On appeal, the supreme court determined which procedures the teacher should have been afforded under these circumstances.⁴⁰⁵

The court began its analysis with a discussion of the *Jerviss*

granted the teacher's motion and held she was entitled to notice and a hearing as provided in Minnesota Statutes section 125.12, subdivision 4. *See id.* at 641.

397. *Id.* at 645.

398. *See id.* at 646. The supreme court stated that a teacher should not be denied notice and a hearing without a clear legislative mandate. *Id.*

399. 354 N.W.2d 9 (Minn. 1984).

400. *Id.* at 11.

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.* The district court decided the negotiated plan required the post-hearing

decision. Under *Jerviss*, the *Atwood* court stated, "the presence of a plan negotiated under Minn. Stat. § 125.12, subd. 6a (1982), does not abrogate or eliminate any other statutory rights under section 125.12."⁴⁰⁶

Applying this rule, the *Atwood* court held the teacher had a right to demand a hearing even if the negotiated agreement did not provide for one. In applying this rule, however, the supreme court held that the April 1 deadline contained in the negotiated plan was waived by the teacher when the teacher requested a hearing under section 125.12, subdivision 6b of Minnesota Statutes.⁴⁰⁷

Apparently, *Atwood* allows a teacher to reject a negotiated plan in favor of the statutory procedures contained in subdivision 6b. It is important to note that this holding was applied to a procedural matter and not to substantive provisions contained in the negotiated plan. Thus, there remain several unanswered questions regarding the extent to which the statutory 6b provision will override substantive provisions contained in a 6a plan.

In dictum, *Ruter v. Independent School District No. 34*⁴⁰⁸ expounded upon the supreme court's holding in *Jerviss*. The *Ruter* court indicated, "Where a negotiated plan fails to incorporate a procedure authorized by the general unrequested leave statute and also does not explicitly disallow the statutory safeguards, the plan 'may be read to incorporate the statutory requirement . . . by implication.'"⁴⁰⁹ The court, however, ultimately relied upon the explicit terms of the negotiated teachers' contract by concluding the negotiated plan also permitted

conclusion of the school board to be completed by April 1. The process was not completed until May 25. *See id.*

406. *Id.* at 12. The supreme court noted that *Atwood* did not involve a school board failure to comply with section 125.12, but involved actual compliance with section 125.12 and an attempt to comply with the collective bargaining agreement's terms. *See id.*

407. *See id.* at 13. When waiver occurs, "school boards are required only to observe the procedural requirements under section 125.12, unless some prejudice is established." *Id.*

408. 364 N.W.2d 823 (Minn. Ct. App. 1985), *petition for rev. denied* (Minn. June 14, 1985). The teacher was employed full-time at a vocational school and served as a technical tutor. His position as tutor was cut. He was granted a hearing regarding his seniority under a different position, but was denied reinstatement. *Id.* at 823-24.

409. *Id.* at 826 n.2 (quoting *Jerviss*, 273 N.W.2d at 645). The court of appeals noted that the statutory plan would permit the teacher to bump a less senior teacher. *See id.*

the teacher to take the position of a less senior teacher.⁴¹⁰

*Peck v. Independent School District No. 16*⁴¹¹ addressed the relationship of subdivisions 6a and 6b when dealing with substantive aspects of the unrequested leave of absence statute. The negotiated 6a plan in *Peck* allowed the school district to place a more senior teacher on unrequested leave of absence even if the teacher was licensed to teach a particular subject but had not taught that subject in the school district. Without mentioning *Jerviss*, the Minnesota Court of Appeals stated:

Subd. 6a authorizes the parties to negotiate a seniority policy and procedures to reduce teaching staff when necessary. Subd. 6b does not apply where, as here, the parties have reached an agreement. Subd. 6b does not require that teachers, in addition to being licensed in a subject, also have successfully taught that subject. But a negotiated unrequested leave plan may waive rights afforded to teachers under 6b.⁴¹²

The *Peck* court concluded, therefore, that continuing contract teachers had "the right to bump a probationary teacher only if they [had] successfully taught the subject matter."⁴¹³

410. See *id.* at 826.

411. 348 N.W.2d 100 (Minn. Ct. App. 1984).

412. *Id.* at 103.

413. *Id.* The negotiated plan gave no preference to continuing contract teachers over probationary teachers. Contrarily, subdivision 6b provides:

The board may place probationary teachers on unrequested leave first in the inverse order of their employment. No teacher who has acquired continuing contract rights shall be placed on unrequested leave of absence while probationary teachers are retained in positions for which the teacher who has acquired continuing contract rights is licensed. . . .

MINN. STAT. § 125.12, subd. 6b(a).

The *Ruter* decision was later held to be res judicata against the less senior teacher in the subsequent case *Pirrotta v. Independent School Dist. No. 347*, 381 N.W.2d 55 (Minn. Ct. App. 1986). Although *Pirrotta* was not a party to the original lawsuit, the court of appeals held his interests were adequately represented by the school district. *Id.* at 57. The supreme court later reversed that decision and held a lack of privity between *Pirrotta* and the school district disallowed any collateral estoppel. See *Pirrotta*, No. C9-85-1490 (Minn. Nov. 7, 1986), *rev'g* 381 N.W.2d 55 (Minn. Ct. App. 1986). The supreme court further stated:

Until the legislature may act, we hold that at the second stage of a hearing to place teacher A on unrequested leave, *i.e.*, at the stage where teacher A is claiming a right to bump teacher B, the school district should give notice to teacher B that he or she may intervene to protect their seniority rights, and that failure to intervene will be deemed acquiescence in the school district's action. In some schools, especially those with large faculties, bumping teacher B may cause further bumping, which may require further invitations to intervene, but, even so, it would seem the best way to avoid serial hearings is to provide one hearing, if possible, at which all concerned can be heard. Ordinarily, the relative seniority rights of the faculty

In a consistent decision, the Minnesota Supreme Court upheld the negotiated plan. In *Blank v. Independent School District No. 16*,⁴¹⁴ a teacher of visually handicapped children whose position was being discontinued claimed she was also entitled to seniority as a mainstream elementary education teacher. The school board, however, had already placed the teacher on proposed unrequested leave of absence.⁴¹⁵

The parties' collective bargaining agreement required posting of a seniority list each school year.⁴¹⁶ Any teacher disagreeing with the list was to provide a written challenge within twenty working days.⁴¹⁷ The school district was given ten working days to respond and any revised seniority list was to be binding upon the parties.⁴¹⁸

are not in dispute, so in most cases teacher B may choose not to intervene; but when disputes do arise, as here, a hearing at which both affected teachers may appear should be provided.

Id., slip op. at 6.

414. 393 N.W.2d 648 (Minn. 1986), *rev'g* 372 N.W.2d 386 (Minn. Ct. App. 1985).

415. *Id.* at 649. The teacher testified at her unrequested leave hearing that her experience with handicapped children together with her license in elementary education gave her seniority to bump a less senior elementary education teacher. *Id.*

416. *Id.*

417. *See id.* at n.2.

418. *Id.* The Independent School District No. 16 and the Spring Lake Park Federation of Teachers Local 1355 had negotiated a plan providing for unrequested leave of absence. That plan included the following seniority list requirements:

15.05 Establishment of Seniority List

(A) The school district shall cause a seniority list (by name, date of employment, qualification and subject matter or field) to be prepared from its records. It shall thereupon post such list in an official place in each school building of the district no later than December 15 of each year.

(B) Any person whose name appears on such list and who may disagree with the findings of the school board and the order of seniority in said list shall have twenty (20) working days from the date of posting to supply written documentation, proof and request for seniority change to the school board.

(C) Within ten (10) working days hereafter, the school district shall evaluate any and all such written communications regarding the order of seniority contained in said list and may make such changes the school district deems warranted. A final seniority list shall thereupon be prepared by the school district, which list as revised shall be binding on the school district and any teacher. Each year thereafter the school district shall cause such seniority list to be updated to reflect any addition of or deletion of personnel caused by retirement, death, resignation, other cessation of services, or new employees. Such yearly revised list shall govern the application of the unrequested leave of absence policy until thereafter revised.

(D) Effect: This Article shall be effective at the beginning date of this master contract and shall be governed by its duration clause. This Article shall govern all teachers as defined

In *Blank*, the posted seniority list stated the teacher was "licensed for visual handicapped K-12."⁴¹⁹ She did not object to the list within twenty days but raised the issue regarding multiple qualifications at her unrequested leave hearing. The hearing examiner concluded the teacher was not qualified to bump an elementary teacher under the terms of the collective bargaining agreement and recommended placement on unrequested leave. The school board adopted the hearing examiner's recommendation.⁴²⁰

The supreme court, in a 4-3 decision, agreed with the school board's decision and reversed the district court and the court of appeals, which had ordered the teacher's reinstatement.⁴²¹ The supreme court stated the basis for its decision:

Treating the seniority list as final and binding on the parties by reason of the failure to grieve, in timely fashion, the omission of licensure in a subject matter category may seem a harsh penalty indeed for the failure to perform what some would characterize as a technical requirement. The necessity for bringing a grievance is, however, clearly spelled out in the collective bargaining agreement. Had the seniority list shown respondent as licensed in both elementary education and to teach the visually impaired so that the defect — the absence of any reference to subject matter categories which a teacher had successfully taught within the district —

therein and shall not be construed to limit the rights of any other licensed employee not covered by the master contract or other master contract affecting such licensed employee.

Id. at 649.

419. *Id.* at 650. Both the teacher and the school district agree that "licensed for" is to be read as "licensed for and have successfully taught," to which the supreme court replied that "these arguments give ground for the shocking inference that school administrators cannot write plain English and teachers cannot read it . . ."

Id. at 651.

420. *Id.* at 649.

421. *Id.* at 648. The court of appeals held the posted seniority list did not conform to the format required by the collective bargaining agreement because it failed to list a teacher's subject matter or field. Therefore, the teacher was not bound to use the grievance procedure. See *Blank*, 372 N.W.2d at 389. The supreme court dissent, written by Justice Yetka and joined by Justices Scott and Wahl, agreed with the court of appeals majority, stating in part:

As the lower courts found, the difference between the contract and the list was sufficient to render the agreement incomplete and non-binding, thereby allowing *Blank* to challenge the list at the ULA hearing and at the district court level. The publication of a seniority list exactly as described in the Master Agreement was a condition precedent to *Blank*'s duty to register an objection within 20 working days or to begin grievance procedures.

Blank, 393 N.W.2d at 653 (Yetka, J., dissenting).

lulled respondent into a false sense of security, the issue and, no doubt, the result here, would be quite different. Here, it is the teacher's neglect to follow the grievance procedure which permitted a disputed seniority list to become final.⁴²²

Blank demonstrates that subdivision 6a plans may restrict a teacher's procedural ability to challenge placement on unrequested leave of absence. While that point is clear, the decision raises other unanswered issues such as what forum for review is available if a teacher properly grieves and is nevertheless improperly placed on unrequested leave.

In *Blank*, the collective bargaining agreement provided for arbitration of disputes regarding "interpretation of terms and conditions of employment covered by the agreement."⁴²³ In the absence of such a provision, it is unclear whether the supreme court intends review of the grievance decision by an independent hearing examiner. If not, the school district's resolution of the grievance might not be subject to judicial review.

Recent cases discussing the relationship between subdivisions 6a and 6b leave unanswered questions regarding waiver of subdivision 6b statutory rights when negotiating a plan under subdivision 6a. It appears procedural rights are not forfeited but substantive rights may be waived. Thus, in the future courts will be forced to distinguish substance from procedure in yet another context. In this respect, the court of appeals' discussion in *Peck* seems most consistent with legislative intent.

E. Hiring

In *Cybsyske v. Independent School District No. 196*,⁴²⁴ the supreme court considered the actions available to a teacher who claimed

422. *Blank*, 393 N.W.2d at 652. The supreme court also suggested, regardless of her failure to follow the grievance procedure, that the teacher had not successfully taught as a mainstream elementary teacher. See *id.* at 652-53.

423. *Blank*, 372 N.W.2d at 391 (Lansing, J., dissenting).

424. 347 N.W.2d 256 (Minn.), *cert. denied*, 105 S. Ct. 330 (1984). In 1979, Cybsyske's husband was elected to the school board in a neighboring school district. Later that year, Cybsyske was hired by Independent School District No. 196 as a long-term substitute teacher. In 1980, she applied for a new fifth grade teaching position in Independent School District No. 196. She was not hired to the position because of her husband's strong pro-teacher stance in his position on the neighboring school board. See *id.* at 258-59. For an excellent analysis of the case, see Note, *Employment Discrimination Based On Marital Status*, 11 WM. MITCHELL L. REV. 277 (1985).

she was not hired by a school district because of her husband's pro-teacher positions while acting on another school board. The supreme court first held the teacher did not have an action under the Minnesota Human Rights Act.⁴²⁵ The court held that failure to hire a teacher because of the teacher's husband's political views did not constitute marital status discrimination.⁴²⁶ Recognizing some states construe the term marital status to encompass the identity or situation of a job applicant's spouse, the supreme court held this broad interpretation was also intended by the Minnesota Legislature.⁴²⁷ The court made clear, however, that under the Minnesota Human Rights Act marital status discrimination exists only where the discrimination is "directed at the institution of marriage itself."⁴²⁸

The *Cybske* court next considered whether the teacher stated a cause of action under section 1983 of Title 42 of the United States Code. The teacher claimed her constitutional rights to freedom of speech and association had been violated by the school board's decision not to hire her because of her husband's political views.⁴²⁹ The court discussed the fundamental right to marriage and concluded the teacher had stated a cause of action under section 1983 stating, "the trial court erred in granting summary judgment on plaintiff's section

425. See *Cybske*, 347 N.W.2d at 259-61; see also MINN. STAT. §§ 363.01-.14 (1984) (Minnesota Human Rights Act).

Except when based on a bona fide occupational qualification, it is an unfair employment practice:

...
(2) For an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, or age,

(a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or

...
(c) to discriminate against a person with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

MINN. STAT. § 363.03, subd. 1, quoted in *Cybske*, 347 N.W.2d at 259 (emphasis added).

426. See *Cybske*, 347 N.W.2d at 261.

427. See *id.* at 259-61.

428. *Id.* at 261. The supreme court distinguished *Kraft, Inc. v. State*, 284 N.W.2d 386 (Minn. 1979). *Kraft* involved a company policy which prohibited hiring an applicant whose spouse was already an employee. The *Kraft* court found the antinepotism employment rule to be marital status discrimination. See *Kraft*, 284 N.W.2d at 387. The *Cybske* court adhered to its broad construction of marital status found in *Kraft*, but concluded the political status of one's spouse is not protected under the Minnesota Human Rights Act. See *Cybske*, 347 N.W.2d at 261.

429. *Cybske*, 347 N.W.2d at 261-62.

1983 claim for deprivation of her constitutional right of freedom of association.”⁴³⁰

This case leaves unresolved the central question whether a school district can base its refusal to hire on the views of the teacher’s spouse. While a cause of action does not exist under the Human Rights Act, a cause of action can be filed under section 1983. Further litigation must determine whether a specific action will be successful.

V. ARBITRATION

A. Generally

In *Cloquet Education Association v. Independent School District No. 94*,⁴³¹ the school district assigned a teacher to chaperone a senior high school dance. The teacher claimed the increased time caused by this assignment was a change in the condition of employment and sought arbitration.⁴³² The supreme court held the assignment of a teacher to an additional out-of-class activity affected the teacher’s hours of service, thereby affecting the terms and conditions of employment.⁴³³ Under the collective bargaining agreement, therefore, the teacher had asserted a grievance subject to compulsory binding arbitration.⁴³⁴

In *Mora Federation of Teachers v. Independent School District No. 332*,⁴³⁵ the court of appeals was asked whether a union, as a teacher’s bargaining representative, could file a class grievance

430. *Id.* at 263. The supreme court stated Cybyske could “prevail if she can establish that the decision of the public employer not to hire her was made because of her exercise of constitutionally protected rights and freedoms.” *Id.* at 262. The court thought Cybyske’s action might be enforceable. *See id.* (citing *Sullivan v. Meade Indep. School Dist. No. 101*, 530 F.2d 799 (8th Cir. 1976)).

431. 344 N.W.2d 416 (Minn. 1984).

432. *See id.* at 417.

433. *See id.* at 418.

434. *Id.* The school district argued that assigning chaperones was an exercise of “inherent managerial right” and therefore excluded from mandatory grievance arbitration under the parties’ master contract and PELRA, Minnesota Statutes section 179.66, subdivision 1. The supreme court disagreed. *See id.*

435. 352 N.W.2d 489 (Minn. Ct. App. 1984). In *Mora*, a 185-day teacher duty calendar had been adopted, but did not include a computer workshop held prior to the school year. After protest, the teachers’ union filed a class action grievance against the school district. The union’s request for arbitration was denied by the school district and the union petitioned the district court. The district court denied the union’s motion to compel arbitration based on a lack of standing. *See id.* at 490-91.

under the terms of the collective bargaining agreement. The court of appeals held issues of standing to file a grievance, adherence to grievance procedures, and the arbitrability of the dispute were all issues that should have been submitted to an arbitrator for resolution.⁴³⁶ Where there is an intent to arbitrate and the contested issues are reasonably debatable, those issues will be subject to arbitration.⁴³⁷

The contested issue was held not reasonably debatable in *Berger v. Independent School District No. 706*.⁴³⁸ In *Berger*, the school district and the teacher disputed whether the procedure for placing teachers on unrequested leave "was a negotiated term of the contract and, as such, subject to arbitration, or whether it was grounded in something outside the contract."⁴³⁹ The court of appeals concluded the parties' clear intent under the collective bargaining contract was to invoke the statutorily-prescribed procedures for an unrequested leave of absence hearing.⁴⁴⁰ The teacher properly contested his seniority ranking at the hearing and did not waive his right to contest by not initiating arbitration.⁴⁴¹

The Minnesota Supreme Court also denied the applicability of arbitration in *Duluth Federation of Teachers, Local 692 v. Independent School District No. 709*.⁴⁴² The teachers' union sought to compel arbitration regarding computation of seniority for teachers seeking reemployment. The supreme court stated the collective bargaining agreement specifically prohibited an arbitrator from determining the lawfulness of the agreement.⁴⁴³ Because the issue of whether Minnesota Statutes section 125.17, subdivision 11 was properly applied to compute seniority involved the lawfulness of the agreement, the supreme

436. See *Mora*, 352 N.W.2d 489.

437. See *id.* at 493. The court of appeals found the language in the collective bargaining agreement to be ambiguous. The matter was, therefore, remanded to the arbitrator for determination of standing and prior adherence to grievance procedures. See *id.*

438. 362 N.W.2d 369 (Minn. Ct. App. 1985).

439. *Id.* at 372. If a plan for placing teachers on unrequested leave is not negotiated pursuant to section 125.12, subdivision 6a of Minnesota Statutes, then the statutory plan pursuant to subdivision 6b applies. See *id.*

440. See *id.*

441. The court of appeals held the parties did not intend to arbitrate and, therefore, the challenge to seniority was properly raised at the leave of absence hearing pursuant to section 125.12, subdivision 6b of Minnesota Statutes. See *id.* at 372-73.

442. 361 N.W.2d 834 (Minn. 1985).

443. See *id.* at 836.

court concluded a court proceeding was the proper forum for the dispute.⁴⁴⁴

In *AFSCME District Council 96 v. Independent School District No. 381*,⁴⁴⁵ the court of appeals established standards for the review of an arbitrator's decision. The court of appeals held its review of an arbitrator's decision would be very limited, stating, "When the parties have agreed to avail themselves of the benefits of arbitration, judicial interference should be kept to a minimum. For that reason, the standard to be applied in reviewing arbitration awards is deferential for the arbitrator's decision"⁴⁴⁶

The court went on to explain, "Even if we were to disagree with the arbitrator's decision, it is of no consequence because the arbitrator's construction of the parties' agreement . . . was bargained for; not the interpretation of this court."⁴⁴⁷ An arbitrator's decision will be upheld if the arbitrator acted within his authority in deciding the arbitrated issue.⁴⁴⁸

These recent cases emphasize the difference between legal issues and contested factual issues. Questions of law are properly determined by the court. Arbitration is the proper forum for reasonably debatable issues regarding the employment relationship and arbitrability of the dispute. No drastic changes in judicial principle have emerged.

B. Bargaining Units

The definition of a bargaining unit for purposes of collective bargaining occasionally produces confusion. When an issue arises, petition is made to the Bureau of Mediation Services (BMS). A BMS decision is appealed to the Public Employment

444. *Id.* The supreme court concluded that the issue was one the parties intended to be excluded from arbitration and, therefore, arbitration could not be compelled. *See id.*

445. 351 N.W.2d 33 (Minn. Ct. App. 1984), *petition for rev. denied* (Minn. Sept. 12, 1984). In *AFSCME*, four teachers sought to revise a seniority list to reflect date of hire, not date of joining the union. The school board agreed, but the union filed a grievance and the matter went to arbitration. Relying on the collective bargaining agreement, the arbitrator ruled the list would not be revised. The district court affirmed the arbitrator's decision. *See id.* at 34-35.

446. *Id.* at 35 (citing *Carlstrom v. Independent School Dist. No. 77*, 256 N.W.2d 479, 483 (Minn. 1977)).

447. *Id.* (quoting *Ramsey County v. AFSCME*, 309 N.W.2d 785, 793 (Minn. 1983)).

448. *Id.*

Relations Board (PERB). Any further appeal from that agency is heard by the Minnesota Court of Appeals. Two recent cases have reached that stage, forcing the court of appeals to apply PELRA to determine bargaining unit classification.

In *Hibbing Education Association v. Public Employment Relations Board*,⁴⁴⁹ the Minnesota Supreme Court decided whether PELRA requires the PERB and the BMS to consider the job functions of employees in making bargaining unit determinations for teacher bargaining units.⁴⁵⁰ The BMS and the PERB had established separate bargaining units for teachers and Title I paraprofessionals.⁴⁵¹ The supreme court agreed with this classification and reversed the court of appeals, which had ordered PERB to consider job functions.⁴⁵²

The supreme court based its analysis on the definition of "teacher" in PELRA, which distinguishes the units based on required licensure, and not job function.⁴⁵³ The supreme court held the broad definition of "teacher" in the Minnesota Teacher Tenure Act was not applicable.⁴⁵⁴

449. 369 N.W.2d 527 (Minn. 1985), *rev'g* 346 N.W.2d 389 (Minn. Ct. App. 1984).

450. *Hibbing Educ. Ass'n*, 369 N.W.2d at 530.

451. *Id.* at 528. Title I paraprofessionals are hired to "supplement regular classroom instruction of certain elementary school students performing at a level of one-half year to one year behind their classmates in reading and mathematics." *Id.*

452. *See Hibbing Educ. Ass'n*, 369 N.W.2d at 530. The court of appeals decided the PERB and BMS had relied on an erroneous theory of law in declining to consider whether the paraprofessionals' actual job duties included teaching. *Hibbing Educ. Ass'n*, 346 N.W.2d at 391. The court of appeals stated:

In this case, PERB procedures denied the Hibbing paraprofessionals entrance to a unit of people who are in many ways doing the exact work of the paraprofessionals. This determination procedure allows the school district to unilaterally manipulate the composition of the bargaining unit to its benefit by setting the qualifications for the job. The school district gets the benefit of the paraprofessionals performing teaching functions, yet denies them the advantage of being a part of the teachers' bargaining unit.

Hibbing Educ. Ass'n, 346 N.W.2d at 391.

453. "Teacher" means any public employee other than a superintendent or assistant superintendent, principal, assistant principal, or a supervisory or confidential employee, employed by a school district: (1) *in a position for which the person must be licensed by the board of teaching or the state board of education*; or (2) in a position as a physical therapist or an occupational therapist. *Hibbing Educ. Ass'n*, 369 N.W.2d at 529 (emphasis added) (quoting MINN. STAT. § 179A.03, subd. 18).

454. *See id.* at 530. The Teacher Tenure Act states:

The term "teacher" includes every person regularly employed, as a principal, or to give instruction in a classroom, or to superintend or supervise classroom instruction, or as placement teacher and visiting teacher. Persons regularly employed as counselors and school librarians shall be covered by these sections as teachers if licensed as teachers or as school librarians.

In *Independent School District No. 721 v. School Services Employees, Local 284*,⁴⁵⁵ the court of appeals determined how to calculate a "normal work week" for purposes of PELRA, which does not apply to part-time employees who work less than 35% of the normal work week.⁴⁵⁶ The case involved twelve cooks, six of whom worked thirty-five hour weeks and six of whom worked ten hour weeks. The BMS decided the latter six were excluded from the bargaining unit. The PERB reversed.⁴⁵⁷

The court of appeals held "the 'normal work week' is to be calculated by reference to the normal, predominant work week of the full time employees of the bargaining unit"⁴⁵⁸ The calculation is not made "by averaging the actual hours worked by all employees doing bargaining-unit work in the particular unit."⁴⁵⁹ The court of appeals' calculation tends to exclude workers from PELRA's umbrella.

In fashioning PELRA, the Minnesota legislature clearly meant to exclude some part time employees from coverage under the Act. The legislature was concerned with maintaining the integrity of bargaining units by excluding part time workers who tend to have little in common with full time workers. The existence of conflicting interests among workers can undermine the ability of a unit to bargain effectively.⁴⁶⁰

MINN. STAT. § 125.17, subd. 1(a).

In *Sweeney v. Special School Dist. No. 1*, 368 N.W.2d 288 (Minn. Ct. App. 1985), the court of appeals applied the broad definition of teacher in section 125.17 to hold the three-year probationary period under section 125.17, subdivision 3 is a single period not subject to recalculation when an individual is promoted from a teaching position to an administrative principal position. *Id.* at 291.

455. 379 N.W.2d 673 (Minn. Ct. App. 1986), *petition for rev. denied* (Minn. Mar. 14, 1986).

456. "Public employee" or "employee" means any person appointed or employed by a public employer except:

...

(e) part-time employees whose service does not exceed the lesser of 14 hours per week or 35 percent of the normal work week in the employee's appropriate unit.

MINN. STAT. § 179A.03, subd. 14(e).

457. *Independent School Dist. No. 721*, 379 N.W.2d at 673.

458. *Id.* at 674. "In this case, that would mean that the 'normal work week' is 35 hours. Thirty-five percent of 35 hours is 12.5 hours. Thus, the six cooks who worked ten hours per week were excluded from the bargaining unit." *Id.*

459. *Id.* "In this case, that would mean that the 'normal work week' is 22½ hours. Thirty-five percent of 22½ is 7.88 hours. Thus, the six cooks who worked ten hours per week were included in the bargaining unit by PERB." *Id.*

460. *Id.*

The court of appeals believed its holding was necessary to effectuate legislative intent and to prevent conflicts of interest within the bargaining unit.⁴⁶¹

Proper bargaining unit membership enhances collective bargaining by maintaining bargaining unit integrity. The Minnesota Legislature by enacting PELRA provided guidance regarding bargaining unit identity. These cases demonstrate how Minnesota courts resolve membership disputes to avoid internal bargaining unit conflicts.

VI. APPEAL AND DAMAGES

A. *Forum for Appeals—Jurisdiction of the Court of Appeals*

With the implementation of the new Minnesota Court of Appeals in November 1983,⁴⁶² many uncertainties were created concerning the appropriate forum for review of school board actions. Applicable statutes did not directly address whether review of school board actions would be in district court or instead be reviewed in the court of appeals.⁴⁶³

In *In re Pinkney*⁴⁶⁴ and *Schmidt v. Independent School District No. 1*,⁴⁶⁵ the court of appeals reviewed school board actions without specifically addressing the jurisdictional issue. In *Schmidt*, the Minnesota Supreme Court issued an order quashing a writ of certiorari issued by the district court and permitted discretionary review by the court of appeals.⁴⁶⁶

The issue was squarely presented in *Strand v. Special School District No. 1*.⁴⁶⁷ In *Strand*, however, the school district sought a writ of prohibition from the Minnesota Supreme Court before the court of appeals issued its decision. The court of appeals decided the appeal on the merits without deciding the jurisdictional issue.⁴⁶⁸ In dictum, the court of appeals stated its opin-

461. *Id.*

462. See COURT OF APPEALS ACT, ch. 501, §§ 3-25, 1982 Minn. Laws 569, 570-81 (codified at MINN. STAT. §§ 480A.01-.11 (1984) and scattered sections).

463. See, e.g., MINN. STAT. §§ 125.12, subd. 11 ("judicial review" of teacher terminations); 125.606 (writ of certiorari); see also MINN. R. CIV. APP. P. 120.01 (extraordinary writs).

464. 353 N.W.2d 676 (Minn. Ct. App. 1984).

465. 349 N.W.2d 563 (Minn. Ct. App. 1984).

466. See *Schmidt*, No. C3-83-1691 (Minn. Oct. 31, 1983) (order quashing writ of certiorari and permitting discretionary review).

467. 361 N.W.2d 69 (Minn. Ct. App. 1984), *aff'd in part and rev'd in part*, 392 N.W.2d 881, (Minn. 1986).

468. See *id.* at 72.

ion that it was intended to review school board actions.⁴⁶⁹ The supreme court later denied the writ of prohibition.⁴⁷⁰

The court of appeals clarified jurisdiction in two subsequent cases. In *Brandhorst v. Special School District No. 1*,⁴⁷¹ the court of appeals concluded that it has jurisdiction to hear appeals from teacher termination proceedings. The court cited the supreme court's order denying the writ of prohibition in *Strand*, and its assumption of jurisdiction in *Pinkney*, settling the jurisdictional issue.⁴⁷² In *Grinolds v. Independent School District No. 597*,⁴⁷³ the court of appeals made clear that its jurisdiction to review school board decisions is exclusive and that district courts may no longer issue writs of certiorari for these actions.⁴⁷⁴

Although amendment of Minnesota Statutes section 480A.06, subdivision 3, in 1985 established court of appeals "jurisdiction to issue writs of certiorari to all agencies, public corporations and public officials,"⁴⁷⁵ the Minnesota Supreme Court, in 1986, clarified appropriate review of school board actions. In *Strand*,⁴⁷⁶ the supreme court stated:

Neither our unpublished order in *Schmidt* nor the court of appeals' decision in *Pinkney* is binding on this court. Now, however, we take this opportunity to conclude that it was the intention of the legislature and this court in its rulemaking capacity to vest certiorari jurisdiction for cases of this nature in the court of appeals. The creation of the court of

469. "While we are of the opinion it was intended the court of appeals consider appellate matters of this type, removing appellate review from the trial courts, we do not now address this issue because it is before the Supreme Court." *Id.*

470. *Strand v. Special School Dist. No. 1*, No. Cl-84-1912 (Minn. Nov. 29, 1984).

471. 365 N.W.2d 383 (Minn. Ct. App. 1985), *aff'd* 392 N.W.2d 888 (Minn. 1986).

472. *Id.* at 385.

473. 366 N.W.2d 667 (Minn. Ct. App. 1985).

474. "We see no need to analyze this point any further. Jurisdiction to hear appeals from school board actions lies with the court of appeals, and not the district courts." *Id.* at 668.

475. The amended subdivision 3 provides:

The court of appeals shall have jurisdiction to issue writs of certiorari to all agencies, public corporations and public officials, except the tax court and workers' compensation court of appeals. The court of appeals shall have jurisdiction to review decisions of the commissioner of economic security, pursuant to section 268.10.

Act of May 20, 1985, ch. 165, § 1, 1985 Minn. Laws 452 (codified at MINN. STAT. § 480A.06, subd. 3 (Supp. 1985)). See, e.g., *Voettiner v. Commissioner of Educ.*, 376 N.W.2d 444, 447 (Minn. Ct. App. 1985) (writ of certiorari issued pursuant to Minnesota Statutes section 480A.06, subdivision 3 to review denial of a teaching application when no right to a contested case hearing existed).

476. 392 N.W.2d 881 (Minn. 1986).

appeals precipitated numerous statutory and appellate rule amendments which generally substituted that court for the district court in those areas in which the latter court acted in an appellate capacity. The fact that this area of review, as well as designated other areas, was omitted must be viewed as an oversight, ultimately corrected by the 1985 amendment to Minn. Stat. § 480A.06, subd. 3.⁴⁷⁷

This conclusion and the statutory amendment established the court of appeals' exclusive jurisdiction to issue writs of certiorari to review school district matters.⁴⁷⁸

B. Standard of Review

The standard of review on appeal is often stated as follows:

The nature of judicial review in a certiorari proceeding under Minn. Stat. § 125.12 is limited. The school board's decision to terminate a teacher will not be heard de novo and will not be set aside by a reviewing court unless the decision is fraudulent, arbitrary, unreasonable, not supported by substantial evidence on the record, not within the school board's jurisdiction or based on an erroneous theory of law.⁴⁷⁹

Only decisions falling within the applicable standard of review will be reversed. The court of appeals does not have "liberty to hear the case de novo and substitute its findings for those of the school board."⁴⁸⁰

Great deference is given to the school board's or the hearing examiner's position and opportunity to see and hear witnesses and to judge credibility.⁴⁸¹ This substantial deference is dissolved only by manifest injustice or insubstantial evidence.⁴⁸² To determine whether substantial evidence supports a finding,

477. *Id.* at 883.

478. In a companion case, the supreme court affirmed the court of appeals' certiorari jurisdiction. *See Brandhorst*, 392 N.W.2d at 888-89.

479. *Peck v. Independent School Dist. No. 16*, 348 N.W.2d 100, 101 (Minn. Ct. App. 1984); *see Ganyo v. Independent School Dist. No. 832*, 311 N.W.2d 497 (Minn. 1981); *Kroll v. Independent School Dist. No. 593*, 304 N.W.2d 338 (Minn. 1981).

480. *Kroll*, 304 N.W.2d at 342; *see Grinolds v. Independent School Dist. No. 597*, 346 N.W.2d 123, 128 (Minn. 1984).

481. *See Russell v. Special School Dist. No. 6*, 366 N.W.2d 700, 703 (Minn. Ct. App. 1985) (citing *Fisher v. Independent School Dist. No. 622*, 357 N.W.2d 152, 155 (Minn. Ct. App. 1984)).

482. *See Downie v. Independent School Dist. No. 141*, 367 N.W.2d 913, 916 (Minn. Ct. App. 1985), *petition for rev. denied* (Minn. July 26, 1985).

the entire record must be reviewed.⁴⁸³ Insubstantial evidence will be found only when reasonable minds could not possibly find a basis for drawing the given conclusions.⁴⁸⁴ Whether the appellate court would have reached a different conclusion is not controlling.

C. Attorney Fees and Costs

In *Sweeney v. Special School District No. 1*,⁴⁸⁵ the court of appeals held demotion of tenured teachers without notice and hearing violated section 1983 of Title 42 of the United States Code, thereby entitling the teachers to an award of attorney fees under section 1988.⁴⁸⁶ Because the trial court did not make specific findings of fact to justify the amount of fees awarded, the matter was remanded.⁴⁸⁷ In providing guidance to the trial court, the court of appeals established a framework for determining the reasonableness of attorney fees.⁴⁸⁸ In *Robertson v. Special School District No. 1*⁴⁸⁹ and *State ex rel. Dreyer v. Board of Education of Independent School District No. 542*,⁴⁹⁰ the

483. *Id.* (citing *Kroll*, 304 N.W.2d at 342).

484. *Id.* (citing *Kroll*, 304 N.W.2d at 343).

Substantial evidence is:

1. Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion;
2. More than a scintilla of evidence;
3. More than some evidence;
4. More than any evidence; and
5. Evidence considered in its entirety.

Kelly v. Independent School Dist. No. 623, 380 N.W.2d 833, 836 (Minn. Ct. App. 1986). Compare *Bye v. Special Intermediate School Dist. No. 916*, 379 N.W.2d 653 (Minn. Ct. App. 1986) (finding substantial evidence supported conclusion financial limitations warranted placement on unrequested leave of absence), *petition for rev. denied* (Minn. Mar. 14, 1986) with *Pinkney*, 366 N.W.2d at 364-65 (Minn. Ct. App. 1985) (school board failed to base its decision on sufficient evidence).

485. 368 N.W.2d 288 (Minn. Ct. App. 1985).

486. *See id.* at 291-92. Section 1983 provides liability for "the deprivation of any rights, privileges or immunities secured by the Constitution." 42 U.S.C. § 1983 (1982); *see id.* § 1988 (granting of attorney fees).

487. *See Sweeney*, 368 N.W.2d at 292.

488. *See id.* "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended, multiplied by a reasonable hourly rate." *Id.* Whether a higher or lower fee should be awarded must be determined in reference to the result obtained. If the relief achieved is exceptional or limited in nature, an appropriate deviation should be made to reflect that relationship. *Id.*

489. 347 N.W.2d 265, 268 (Minn. 1984) (district court is accorded broad discretion in awarding costs and disbursements).

490. 344 N.W.2d 411, 414 (Minn. 1984) (bad faith contention not sustained;

supreme court affirmed the district court's denial of costs.⁴⁹¹ Both cases demonstrate the trial court's broad discretion in awarding costs and fees.

D. Reinstatement Wages

In Minnesota, pursuant to Minnesota Statutes section 125.12, subdivision 11, wrongfully discharged teachers receive full back pay upon reinstatement.⁴⁹² In *Pearson v. School Board of Independent School District No. 381*,⁴⁹³ the court of appeals analyzed the requirements of subdivision 11. A district court had awarded back pay in compliance with subdivision 11, except the district court excluded twelve months pay prior to its order because it believed the school district was not solely responsible for delays that occurred after the teacher's termination.⁴⁹⁴ The court of appeals held the trial court erred because subdivision 11 required the teacher to receive "all compensation withheld as a result of the termination or dismissal order."⁴⁹⁵

The court also held the teacher's back pay must be reduced by "any amounts arising from respondent's duty to mitigate damages."⁴⁹⁶ Thus, a wrongfully dismissed teacher is under a duty to mitigate damages, and wages or other income earned during the period of wrongful dismissal will reduce the amount of back pay received upon reinstatement.

In a slightly different context, the supreme court held Minnesota Statutes section 181.13,⁴⁹⁷ which requires payment of

therefore denial of attorney fees and costs pursuant to Minnesota Statutes section 549.21 proper).

491. *Id.*

492. The pendency of judicial proceedings shall not be grounds for postponement of the effective date of the school board's order, but if judicial review eventuates in reinstatement of the teacher, the board shall pay the teacher all compensation withheld as a result of the termination or dismissal order.

MINN. STAT. § 125.12, subd. 11.

493. 356 N.W.2d 438, 441-42 (Minn. Ct. App. 1984).

494. *See id.*

495. MINN. STAT. § 125.12, subd. 11.

496. *Pearson*, 356 N.W.2d at 442 (citing *Soules v. Independent School Dist. No. 518*, 258 N.W.2d 103, 105-08 (Minn. 1977); *Stevens v. School Board of Indep. School Dist. No. 271*, 296 Minn. 413, 415, 208 N.W.2d 866, 868 (1973)).

497. When any person, firm, company, association, or corporation employing labor within this state discharges a servant or employee, the wages or commissions actually earned and unpaid at the time of the discharge shall become immediately due and payable upon demand of the employee. If the employee's earned wages and commissions are not paid within 24 hours after such demand, whether the employment was by the day, hour, week,

wages due within twenty-four hours after demand if an employee is discharged, applies to school districts. In *Robertson*,⁴⁹⁸ the school district discharged a teacher and failed to comply with the teacher's request to pay his wages due.⁴⁹⁹ Although the district did not have the authority to pay the wages within the statutory twenty-four hour period, the supreme court upheld the district court's award of penalty for failure to comply with the twenty-four hour requirement contained in section 181.13.⁵⁰⁰

The court of appeals has established its jurisdiction to review school board actions by writ of certiorari. In reviewing school board decisions, the court is bound to defer to the school board's broad discretion. A trial court's award of attorney fees, costs, or reinstatement wages will also be given substantial deference. Litigants must make a strong showing of clear error to overcome a lower forum's unfavorable ruling.

CONCLUSION

The sweeping path of recent Minnesota education law has forged radical changes in certain areas and consistently expanded others. Although summary can be made of recent developments, many questions remain unanswered. Only future

month, or piece or by commissions, the discharged employee may charge and collect the amount of his or her average daily earnings at the rate agreed upon in the contract of employment, for such period, not exceeding 15 days, after the expiration of the 24 hours, as the employer is in default, until full payment or other settlement, satisfactory to the discharged employee, is made. . . . The wages and commissions must be paid at the usual place of payment unless the employee requests that the wages and commissions be sent to him or her through the mails. If, in accordance with a request by the employee, the employee's wages and commissions are sent to the employee through the mail, the wages and commissions shall be deemed to have been paid as of the date of their postmark for the purposes of this section.

MINN. STAT. § 181.13 (1984).

498. 347 N.W.2d 265 (Minn. 1984).

499. *See id.* at 266.

500. *See id.* at 268. The court stated:

There is no statutory exception providing school districts with a special time period for paying discharged employees their wages. The administrative delay here, whether necessary or not, does not operate to create an exception to the statute. As a practical matter, the school board may wish to direct the attention of the legislature to the situation where it is powerless to comply with the demand for payment by an employee without first seeking board approval for the disbursement of funds and it is difficult to call the board together to satisfy the statutory time limitation.

Id.

litigants and forthcoming opinions will answer these questions. Practitioners should remain alert to further developments in education law and derive their own forecasts for prospective expansion.